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School for Advanced Legal Studies



STATE CREATION: THE LEGITIMACY OF UNILATERAL SECESSION AND  
RECOGNITION IN INTERNATIONAL LAW.

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(MWHAGN001)

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of LLM (Master of Laws - Public International Law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## DECLARATION

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## ABSTRACT

Since the twentieth century, the proliferation of new States has not declined in the twenty first century. Several small territories have declared themselves as sovereign States by claiming statehood in international law. These developments have a significant measure in many respects of international law notions of self-determination, secession, recognition and decolonisation.

States remain primary subjects of international law. Despite the fundamental legal framework on creation of States enshrined in the Montevideo Convention on the Rights and Duties of States, 1933 (Montevideo Convention), the creation of States and unilateral secession remain part of the controversial and unsettled issues of international law. This is because of the legal and factual situation that evolves around the concepts of State creation and unilateral secession.

Besides, while the legal framework on State creation is in place, other new criteria continue to develop, alongside are concepts of unilateral secession and self-determination. It therefore follows that in any given situation of contemporary international law, the concepts of State creation, secession and self-determination cannot be discussed in isolation.

In this thesis, I will analyse the notions of statehood, secession and recognition. I will argue that in contemporary international law or post-colonial era, unilateral secession and satisfying the traditional criteria of statehood does not qualify the clamant entity to become a new State. Secondly, I will argue that although recognition is not a rule of customary international law, State practice on recognition and other suggested criteria play a significant role with regards to creation of States in international law.

Thirdly, the Republic of Somaliland – the case study, will be analysed against the criteria of statehood and the application thereof. The study will also provide a general analysis of a few specific cases of successful and unsuccessful attempts at secession.

## DEDICATION

Dedicated to the glory of God Almighty and my parents; my mother, Maureen Namasiku Kabati - Mwaihomba and in memory of my father, John Mwaihomba whose wishes were always to see me attain a higher learning education but left too soon to be with the Lord. My parents loved, inspired, influenced and directed me to be what I am today. To my father, he remains in my heart and May His Soul Rest in Eternal Peace. To my mother, May God continue to bless you, a mother whose love is immeasurable to me.

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Agnes Mwaihomba

Cape Town

## ACRONYMS

ACHPR	African Charter on Human and People's Rights
AU	African Union
DARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
EC	European Commission
EPLF	Eritrean People's Liberation Front
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFY	Federal Republic of Yugoslavia
ILC	International Law Commission
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
SCC	Supreme Court of Canada
SNM	Somali National Movement
SSLM	Sudan Liberation Movement
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
TRNC	Turkish Republic of Northern Cyprus
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UN-HABITAT	United Nations Human Settlement Programme
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nation Security Council
WHO	World Health Organisation

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## CHAPTER I: INTRODUCTION

### I. INTRODUCTION

The main focus of discussion in this study is the creation of States, recognition and secession. Against this background lays the research question, '*State creation: The legitimacy of unilateral secession and recognition in international law.*'

According to international law dictionary, a State is defined as;

“An entity with a defined territory, with a population, under the control of its own government which engages in and has the capacity to engage in formal relations with other States”.<sup>1</sup>

The above definition follows a classical one enshrined in Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 (Montevideo Convention) as possessing:<sup>2</sup> a) permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States.<sup>3</sup> These criteria have been accepted as indicia requirements for statehood (declaratory theory) and have been passed into customary law.<sup>4</sup>

In view of the foregoing, it has been established that the acquisition of statehood be determined by satisfying the criteria listed in Article 1 of the Montevideo Convention.<sup>5</sup> Furthermore, Article 2 of the Montevideo Convention provides that ‘The federal State shall constitute a sole person in the eyes of international law.’<sup>6</sup> Drawing these two articles, it is evident that the Montevideo Convention forms the traditional foundation of statehood.

In an effort to answer the research question, this study is centred on examining the concepts of statehood and secession. This analysis highlights the drawbacks associated with satisfying the traditional requirement of statehood and recognition by existing States.

To test the theory on the creation of States and secession, this dissertation will apply the traditional concept of statehood and the notion of secession. Besides, the study will also assess the question against the theories of recognition (declaratory and constitutive) as these present a significant view to consider in any given factual situation of statehood.

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<sup>1</sup> Boleslaw A Boczek *International Law, A Dictionary* (2005) 119.

<sup>2</sup> DJ Harris *Cases and Materials on International Law* 6 ed (2004) 166.

<sup>3</sup> Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.

<sup>4</sup> TW Bennett & J Strug *Introduction to International Law* (2013) 57.

<sup>5</sup> Hannah Woolaver ‘State failure, sovereign equality and non-intervention: Assessing claimed rights to intervene in failed States’ (2014) 32 *Wisconsin International Law Journal* 595 at 597.

<sup>6</sup> Article 2 *supra* note 3.

Central to the research question is a case study of Somaliland's unilateral secession and its declaration of independence. This includes an analysis of Somaliland satisfying the traditional requirements of statehood and its non-recognition by existing States. To a lesser extent, other examples such as Biafra, Eritrea, Katanga, Kosovo and South Sudan which form part of territorial entities that have attempted to or seceded from their parent States will also be examined.

This dissertation will progress in five chapters as set out below.

*a) Structure of the dissertation*

Chapter I is an introductory of the thesis which outlines the focus of the study by setting out the research question, scope, purpose, significance, justification, structure and problem statement of the study.

Chapter II makes emphasis on early theoretical doctrines underpinning the process of State creation resulting into additional criteria and contemporary theories of recognition (constitutive and declaratory theories). The main aim of this chapter is to define the concept and traditional criteria of statehood in international law. This will be followed by recognition theories against which, hinges the Republic of Somaliland's status in international law.

The chapter will also establish the nexus between the statehood criteria and recognition requirements. The argument in this chapter favours the model of recognition and other additional criteria of statehood. It will be argued that in contemporary international law, an entity claiming statehood does not exist without being recognised by existing States. The objective against this background is that, while examining the critical issues on creation of States in international law, it is also imperative to review the normative requirement for an entity claiming to be a State. The *modus operandi* employed in this chapter is doctrinal law. This is because not only does the study examine the modern practice of State creation but also review the basic concept of statehood in international law. This approach is also significant in succeeding chapters.

Chapter III will describe the theories of secession followed by a brief overview and analysis of post-colonial successful and unsuccessful cases of unilateral secession. To a lesser extent, a comparison of the African to European international legal systems following the guidelines provided by the European Council (EC) with regards to recognition of new States in the wake of Kosovo's declaration of independence and the recent break-up of the former Federal Republic of Yugoslavia (FRY) will be made.

Chapter IV which is central to this study will narrow down the focus to Somaliland and commence by providing a historical overview that led to the declaration of independence of and establish the facts surrounding Somaliland. Thereafter, Somaliland's assertion and claim to statehood and its autonomous claims for independence will be reviewed. However, this act is viewed as incompatible with the principle of territorial integrity of States which protects the parent State of the independent-seeking entity. It will be argued that if it were accepted, would this mean that international law directly prohibits unilateral declarations of independence or only acceptance of such declarations by existing States?

Nonetheless, this chapter will implement the classical criteria of statehood; assess and analyse Somaliland's qualification to be a 'State' and acknowledge that as a matter of fact, for Somaliland to be successful in its attempt at secession, the process of recognition within the existing international community is required. Particular attention will be paid to its non-recognition on the international plane, a fact precluding Somaliland from achieving its statehood. Conceivably, international practice does not support claims of statehood without recognition.

Chapter V will draw summaries from the first four chapters and make conclusions.

#### *b) Problem statement*

In pursuit of self-determination, a number of entities have seceded or attempted to secede from their parent States and declared themselves as independent States. What is still unclear is whether international law supports declaration of new independent entities created through secession without the consent of the parent State or recognition of a new State by existing States is now a rule of customary international law.<sup>7</sup> A question of debate arise as to when does an entity qualify to become a State in international law?<sup>8</sup> Does it rest on the objective application of the rules of international law; is it upon recognition approach and acceptance of the claimant entity by existing States or; could it be admission to the United Nations (UN) or upon satisfying the traditional criteria of statehood? A definite answer to the question of statehood has however, been difficulty to provide and therefore, remain a matter of subject debate.

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<sup>7</sup> Marcelo G Kohen 'Introduction' in Marcelo G. Kohen (ed) *Secession: International Law Perspectives* (2006) 3.

<sup>8</sup> Martin Dixon *Textbook of International Law* 6 ed (2007) 115.

Usually, international law issues related to statehood arise from unusual political disorder such as a breakup of an existing State into several States, secession of a territory becoming into an independent State or merger of a State. However, circumstances evolving around emergence of new States, for example, those succeeding to the Soviet Union and Yugoslavia raised questions as to whether the traditional requirement of statehood under customary international law should be supplemented by additional criteria such as recognition and those denoted in the European Community (EC) Declaration on Yugoslavia and on the Guidelines on Recognition of New States in the Eastern European and the Soviet Union.<sup>9</sup>

The Republic of Somaliland is one such a territorial entity which declared itself an independent State. It is however, significant to note that over the past years, the Republic of Somaliland has slowly advanced its quest to achieve statehood. This is being pursued through momentum gain on its international relations with other existing States in the international community. However, the unending internal conflict that has gripped the parent State, the Republic of Somalia would possibly be among the reasons impeding Somaliland to becoming a State.

Negotiations for a comprehensive peaceful disunion with the parent State have been on-going for more than two decades when Somaliland self-declared its independence amidst disintegration of the Republic of Somalia in 1991. Other neighbouring provinces of Somaliland such as Puntland also claimed their self-independence. The disintegration of Somalia was and continues to be a result of inter-ethnic violence within that State, rendering it to have an ineffective government and highly rated as a 'failed State'.<sup>10</sup> However, there have been major concerted efforts by the international community to bring peace and find solution for Somalia's internal problems but chances to get a solution to the problems remain blurred.

It is concluded that although self-declared as an independent State, the Republic of Somaliland remain internationally un-recognised as a State.<sup>11</sup> Besides, recognition plays a major role in the creation of States, but it has not been passed as a rule of customary international law. Similarly, unilateral secession has not been favourably supported by international law.

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<sup>9</sup> *European Community (EC) Declaration on Yugoslavia and on the Guidelines on Recognition of New States* 1992 (31) ILM 1482.

<sup>10</sup> Woolaver op cit note 5 at 603 – 604.

<sup>11</sup> Peggy Hoyle 'Somaliland: Passing the Statehood Test?' *IBRU Boundary and Security Bulletin* 8 no. 3 (2000) 88.

*c) Significance of the study*

The significance of choosing the study on the creation of States and unilateral secession is because States have remained the primary legal persons - subjects of international law capable of possessing international legal rights and duties which are obligatory in the international legal system.<sup>12</sup> From academic perspective, the study fills up a gap created by a shortage of scholarly literature on creation of States focussing on Somaliland.

As established in this study, while there is some literature on creation of States and unilateral secession in international law, there is not enough literature with a particular focus on Somaliland's statehood. This thesis would contribute to the literature on creation of States in international law.

*d) Purpose of the study*

The objective of this study is to examine the legitimacy of unilateral secession as a method of State creation in international law. The main focus of assessment is Somaliland while an overview and brief assessment of successful and unsuccessful attempts at secession have also been employed.

*e) Scope and limitation of the study*

The Republic of Somalia from which Somaliland seceded is rated as a failed State. Issues related to failed States is not within the scope of this thesis. However, considering that the case study chosen exists within a failed State, reference to failed States will on a lesser extent be made.

In addition, although recognition is viewed by some legal scholars as a political issue in creation of States, the underling political and economic issues that have a bearing on the status of Somaliland and the conflicts within the Republic of Somalia are not part of this study. The study solely focuses on the legal aspects of secession and creation of States in international law.

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<sup>12</sup> Bennett & Strug op cit note 4 at 57; Harris op cit note 2 at 133.

### *f) Methodology*

In this study, a desk-based qualitative approach of research has been employed. Based on primary and secondary sources, an analysis of literature review will provide the conceptual legal framework for ensuing examination of the case study. The primary sources are case law, legal documents including the United Nations Security Council (UNSC) Resolutions, International Court of Justice (ICJ) and Permanent Court of International Justice (PCIJ) Advisory Opinions. Secondary sources are books, journal articles, legal reports and other related online materials of new ideas and information. All these sources will be used in almost every part of this study.

## II. CONCLUSION

This chapter has introduced the central research question by outlining key terms and identifying the legal background to the study. The research question centres on the legality of unilateral secession as a method of State creation in international law. Secession has little support in international law and its legality is still imprecise and remains as an unsettled issue in international law.

Other than discussing the modules of the study, this chapter has identified the legal problems to be dealt with in this study; to be precise, the debate on whether international law supports unilateral secession and whether recognition of entities claiming statehood without the consent of the parent State from which they are seceding, is now part of customary law. This is based on the growing State practice in the international community. On the other hand, although recognition plays a major role in the creation of States, it has not yet been passed as a rule of customary international law. But drawing the current State practice, recognition will soon be passed into customary law.

In addition, supplementary questions, significance and the objective have been introduced. Also set out in this chapter is an outline of the structure to be followed in this study.



## CHAPTER II: THE CONCEPT OF STATEHOOD IN INTERNATIONAL LAW

### I. INTRODUCTION

International law is generally viewed as a system governing relations among States<sup>13</sup> and this chapter begins with the concept of statehood in contemporary international law. It further analyses the constitutive and declaratory theories of recognition.

Despite the increasing number of international law actors, States have remained the primary and significant subjects of international law bearing capacity needed to exercise all the rights, powers and duties required in the international legal system.<sup>14</sup> However, the emergence of many new States particularly through secession has been the major source of conflicts in the world; as such, State practice and international law have to some extent changed in nature.<sup>15</sup>

In the nineteenth century, no rules existed to determine what a State was as the matter was solely determined by the existing States in international law.<sup>16</sup> However, the contemporary conception of statehood is drawn from the Peace of Westphalia established around 1648.<sup>17</sup> During this period, State practice was represented in the *Leizbniz's Caesarinus* where 'sovereignty was redefined to mean a ruler's power to command obedience, a certain minimum area of territory and actual military control of that area';<sup>18</sup> as a result, sovereignty became interrelated to territory, people and centralised government.<sup>19</sup>

In the twentieth century, one of the major political developments is the emergence of territorial entities declaring independence as new States, a situation which is usually and persistently opposed by the State from which independence is being declared.<sup>20</sup> While sometimes the creation of a new State ensued after declaration of independence by an entity, other times it did not.<sup>21</sup> There are currently 193 United Nations (UN) Member States of

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<sup>13</sup> Bennett & Strug op cit note 4 at 57.

<sup>14</sup> Ibid.

<sup>15</sup> James Crawford *The Creation of State in International Law* 2 ed (2006) 4.

<sup>16</sup> Ibid at 5.

<sup>17</sup> Bennett & Strug op cit note 4 at 57.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> *Advisory Opinion, Accordance with international law of the unilateral declaration of independence in respect of Kosovo* 2010 ICJ Rep para 79; Crawford op cit note 15 at 4

<sup>21</sup> Ibid *Kosovo Advisory Opinion* para 79.

which some have come into existence through secession - for example, Eritrea and South Sudan are the two successful African States that came as a result of consensual secession.<sup>22</sup>

Although the criteria for the creation of States are laid down by law, Crawford argues that, '... formation of a new State is ... a matter of fact and not of law.'<sup>23</sup> He further states that, '... where a State actually exists, the legality of its creation or existence must be an abstract issue: the law must take account of the new situation, despite its illegality.'<sup>24</sup> Similarly, where a State does not exist, rules treating it as existing are purposeless and without authenticity because the criteria of statehood should be effective and not legitimacy.

## II. THE DOCTRINE OF STATEHOOD IN EARLY INTERNATIONAL LAW

The natural law and positivism are two main central approaches to international law. Since early seventh century, the question of statehood had continued to develop around international law.<sup>25</sup> Crawford explains that Hugo Grotius and Samuel Pufendorf defined a State as 'a complete association of free men' joined together for the enjoyment of rights and for their common interests.<sup>26</sup> However, Grotius's definition was philosophical rather than legal because the naturalist philosophical argument entails that;

'The existence of States was taken for granted; the State, like the men who compose it, was automatically bound by the law of nations which was practically identical with the law of nature: outside of the sphere of the law of nature, which is also nations'.<sup>27</sup>

Therefore, the existence of the population that composed a State were automatically bound by the law of nature which is frequently referred to as nations.<sup>28</sup> However, natural law scholars argue that laws are derived from morality, religion or divine justice and universal principle and not from an authoritative opinion.<sup>29</sup>

Contrary to Grotius's definition, Francisco de Victoria gave a much more legal definition of a State. Victoria stated that, 'A perfect State ... is one which is complete in

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<sup>22</sup> Connie de la Vega *Dictionary of International Human Rights Law* (2013) 149; United Nations Regional Information Centre for Western Europe 'UN welcomes 193rd member state, available at <http://www.unric.org/en/latest-un-buzz/26841-un-welcomes-193rd-member-state>, accessed on 15 November 2016.

<sup>23</sup> Crawford op cit note 15 at 4; See also the formation in Willoghby, *Nature of the State* 195 where it is stated that Sovereignty upon which all legality depends, is itself a question of fact and not law'.

<sup>24</sup> Ibid Crawford.

<sup>25</sup> Ibid at 6.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid

itself, has its own laws and council ..., such a State has ... authority to declare war and no one else'.<sup>30</sup> From a legal perspective at this point, Victoria brought in the renowned criteria of government and independence in view of entities that may declare war.<sup>31</sup>

On the other hand, positivist theory is opposed to natural law theory. With positivist theory, Crawford affirms what Emmerich de Vattel argued that authority is what makes law, and that both the actual behaviour of States and the authorities are the foundation of law.<sup>32</sup> Every Nation which governs itself under whatever form, and which does not depend on any other nation is a sovereign State.<sup>33</sup> Therefore, the positivists tend to focus more on legal and illegal than morality ideas. The author asserts that positivist theory gained much support at the time. By the nineteenth century, positivism theory had received much support and became a more accepted theory than naturalist theory in international law.<sup>34</sup>

### III. THE CRITERIA FOR STATEHOOD IN INTERNATIONAL LAW

States are created in different ways; sometimes by armed struggle, revolution and rebellion, or by regrouping and unification.<sup>35</sup> As established in the first chapter, the declaratory theory of statehood founded on the provisions described in the Montevideo Convention is the traditional criteria accepted in international law. These classical criteria are widely accepted as indicia of statehood and have been passed into customary law.<sup>36</sup> Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 prescribes an objective and descriptive criteria for statehood that:-

‘The State as a legal person of international law should possess the following qualifications:  
a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States.’<sup>37</sup>

The Montevideo Convention requirements received support from *Opinion 1 of the Arbitration Commission of the European Conference* which declared that,

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> *S v Banda* (1988) (4) SA 519 (B) at 523

<sup>36</sup> Martin Dixon & Robert McCorquodale *Cases and Materials of International Law* 4 ed (2003) 133.

<sup>37</sup> Article 1 supra note 3.

‘A State is commonly defined as a community which consists of a territory and a population which is subject to an organised political authority’ and that ‘such a State is characterised by political sovereignty’.<sup>38</sup>

*a) Permanent population*

A State is composed of not only a territory but also a discrete group of individuals.<sup>39</sup> In determining the qualification of statehood against a claimed entity in international law, courts have applied permanent population as a criterion that:

‘The jurisdiction of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.’<sup>40</sup>

For an entity to qualify as a State, the doctrine of international legal system does not necessarily require a minimum and fixed number of the inhabitants.<sup>41</sup> It is assumed that the theory of permanent population as a criterion is not static. In the *Western Sahara Case*, the court found that the population of Western Sahara consisted of nomads who travel across the desert without regard to boundaries. The court held that nomadic people did have certain rights with regards to the land they traversed.<sup>42</sup>

It also follows that while India has an estimated population of over a billion within its territorial borders, micro States such as the Vatican City, Nauru and Seychelles which have small populations of approximately 768, 10 000 and 12 000 respectively, are recognised States.<sup>43</sup> Despite the inequality in population figure, States possess the same equal voting on the international plane. Additionally, States enjoy sovereign equality in the international community irrespective of their internal character.<sup>44</sup>

In addition, international law takes into account persons who are found habitually residents of a new State and they automatically acquire the nationality of the new State and relinquish their former.<sup>45</sup> However, this is another subject to rights in the new State to restrict

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<sup>38</sup> European Community: *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States* 31 ILM (1992) 1485.

<sup>39</sup> Dixon op cit note 8 at 115.

<sup>40</sup> Article 9 of the Montevideo Convention.

<sup>41</sup> Dixon & McCorquodale op cit note 36 at 136.

<sup>42</sup> *Western Sahara Advisory Opinion* 1975 ICJ Rep 12 ILR at 59.

<sup>43</sup> Crawford op cit note 15 at 52; Harris op cit note 2 at 100; John Dugard SC *International Law: A South African Perspective* 4 ed (2011) 83.

<sup>44</sup> Article 2 of the United Nations Charter; Woolaver op cit note 5 at 597.

<sup>45</sup> Ibid.

who may be its nationals.<sup>46</sup> For example, in the *Case Concerning Acquisition of Polish Nationality*, the Permanent Court of International Justice (PCIJ) held that:

‘.. the Minority Treaties in general and the Polish Treaties in particular have been concluded with new States or with States which, as a result of war, have had their territories considered enlarged and whose population was not therefore clearly defined from the stand point of political allegiance.’<sup>47</sup>

Therefore, the population which was initially not a permanent population of a territory becomes a population or although not physically present on the territory, nationals who are abroad are regarded as a population of that particular territory. Certainly, the issue of permanent population is not viewed as an obstacle to satisfying the criterion of permanent population.

#### *b) Defined territory*

An entity claiming statehood should have a defined territory with physical existence that marks it out from its neighbours. In determining cases of statehood in international law, the criterion of ‘defined territory’ as laid down in the Montevideo Convention has been applied by courts. A defined territory should mean that there exists an agreed border with the claimant State’s neighbours.

However, there are a number of disputed borders among States over the precise demarcation but even if the entity's territorial boundaries are not precisely demarcated, or are to some extent in dispute, the requirement of territory remain satisfied.<sup>48</sup> For example, India and Pakistan have had their borders disputed over Jammu-Kashmir since independence but their statehood has not been affected;<sup>49</sup> Israel has continued its territorial claim over Palestine but was admitted to the United Nations (UN) and her statehood status has remained unaffected.<sup>50</sup> Therefore, what matters is a consistent band of territory which is undeniably within a certain area controlled by the purported State.<sup>51</sup> This is because recognition of a State remains even though borders with its neighbours are uncertain. In the *Deutsche Continental Gas-Gesellschaft v Polish State*, the German-Polish Mixed Arbitral Tribunal said that;

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<sup>46</sup> Ibid.

<sup>47</sup> *Acquisition of Polish Nationality Advisory Opinion* 1923 PCIJ (ser. B) No. 7.

<sup>48</sup> *S v Banda* 1989 (4) SA 519 (B) at 540 D-F.

<sup>49</sup> Ibid.

<sup>50</sup> Dixon op cit note 8 at 115.

<sup>51</sup> Ibid at 116

‘In order to say that a State exists and can be recognised as such ... it is enough that ... its territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited.’<sup>52</sup>

In the *North Sea Continental Shelf Cases*, the court held that,

‘There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations.’<sup>53</sup>

Equally in the *Island of Palmas Case*, the dispute over sovereignty on the Islands of Palmas was brought for arbitration to determine whether the Island of Palmas in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America. In his observation, Judge Max Huber said that, ‘Sovereignty in relation to the portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State.’<sup>54</sup>

### c) *Government*

In order to occupy a position as a State in international law, an entity claiming statehood must have a government whose core responsibilities are international rights and duties of a State, self-governing or independent of any other power.<sup>55</sup> The government should be ‘*effective and functional*’, exercising internal and external independence; and effective power over the permanent population and the territory it claims sovereignty.<sup>56</sup> Internal and external governance should be displayed by the claimant entity through exhibiting capability of maintaining legal order and rule internally and; act unilaterally without the support of external actors.<sup>57</sup>

With the exception of law and maintenance of order as well as creation of institutions, international law has no specific requirement as to the nature and degree of general control.<sup>58</sup> Although there is a distinction of governments from their States in international law, it is only the government of that State which can enter into treaties with other legal persons of

<sup>52</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 AD.11 at 15.

<sup>53</sup> *North Sea Continental Shelf Judgment*, (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 46.

<sup>54</sup> *Island of Palmas Case (United States v The Netherlands)* 1928 (2 RIAA) 829 at 838.

<sup>55</sup> *S v Banda* supra note 48 at 540 G-F.

<sup>56</sup> Dixon op cit note 8 at 117.

<sup>57</sup> Nicklas Jansler ‘Somaliland and Succession under Montevideo Convention on the Right and Duties of States Criteria’ (2015) *Student Centre for African Research Resolutions* 1 at 4.

<sup>58</sup> Crawford op cit note 15 at 59.

international law.<sup>59</sup> Lack of a coherent and functional government may negate a State from carrying out international relations with other States which should in principle render a State to lose its personality. But Brownlie correctly argued that once a State has been established, widespread civil strife or the disintegration of order through foreign invasion or acts of God are not considered to affect legal personality.<sup>60</sup> This leaves a debate of independence and representation to be discussed below.

*d) Capacity to enter into relations with other States*

The fourth requirement of statehood is ‘capacity to enter into relations with other states’.<sup>61</sup> In contemporary international law theories, ‘capacity to enter into relations with other States’ has normally resulted into difficulties to attaining statehood’. This is because this criterion is not constant but dependent on the attitude of existing States in the international community.<sup>62</sup> Primarily, ‘capacity to enter into relations with other States’ should denote that an entity is capable of bearing legal and factual authority and act as an independent State without referring to any other State.<sup>63</sup> In the *Austro-German Customs Union Case*,<sup>64</sup> the PCIJ defined ‘capacity to enter into relations with other States’ as:

‘the sole right of decision in all matters economic, political, financial or other with the result that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible’<sup>65</sup>

Certainly, this fourth requirement signifies independence because a territory cannot be considered as a State if it is under the direct or indirect control of another State. The definition of independence is founded on the *Austro-German Customs Union Case* where a dispute upon which the ICJ was asked to give its opinion. This was in relation to the applicability of the provisions of Article 88 of the Geneva Protocol<sup>66</sup> as to whether the proposed custom union between Austria and German was consistency with obligations of Austria under the Treaty of Saint Germain and the Geneva Protocol. The PCIJ advised that;<sup>67</sup>

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<sup>59</sup> Ibid.

<sup>60</sup> Ian Brownlie *Principals of Public Law* 7ed (2008) 71-88.

<sup>61</sup> Article 1 supra note 3.

<sup>62</sup> Dixon op cit note 8 at 116; Crawford op cit note 15 at 61.

<sup>63</sup> Bennett & Strug op cit note 4 at 58.

<sup>64</sup> *Austro-German Customs Union, Advisory Opinion* (1931) PCIJ Rep Series A/B No 41.

<sup>65</sup> Ibid.

<sup>66</sup> Article 88 of the Treaty of Saint-Germain and the Geneva Protocol.

<sup>67</sup> *Austro-German Customs Union, Advisory Opinion* supra note 64.

‘... Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law’.<sup>68</sup>

However, this meaning is presently considered more restrictive because the growing inter-dependence of States would become a barrier to most of the new emergence States in achieving the status of statehood in international law.<sup>69</sup> In his dissenting opinion, Judge Anzililotti proposed another test of independence; whether the entity in question was legally dependant on another in terms of which it was subject to the will of another.<sup>70</sup>

The notion of independence can be said to be impractical in terms of financial aid and political support as there is no State which does not depend on other States in the international community.<sup>71</sup> It is argued that this requirement is of ‘legal independence’ and not ‘factual autonomy’ which means that a State exists when not under the lawful sovereignty of any other State.

#### IV. ADDITIONAL CRITERIA OF STATEHOOD

As the laid down Montevideo criteria for statehood have become non-exhaustive, some other criteria of statehood in contemporary international law have been suggested. Crawford suggested other determinants of statehood which are; permanence, willingness and ability to observe international law; a certain degree of civilisation and legal order.<sup>72</sup> Furthermore, when applying for membership to the United Nations (UN), an entity should accept to uphold the principles of the UN Charter, the most significant of which are non-use of force, respect of fundamental rights and adherence to a democratic form of government.<sup>73</sup>

It is evident that acceptance in the international community by other States, satisfying the new criteria as suggested by legal scholars and compliance with the purpose and principles of the UN Charter form authoritative criteria to be satisfied by an entity claiming statehood. These are only suggested criteria and therefore, are illegitimate. Although they continue to receive support on the international plane, it is submitted that more time is required to develop these suggested criteria.

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<sup>68</sup> Ibid.

<sup>69</sup> Bennett & Strug op cit note 4 at 58.

<sup>70</sup> Ibid.

<sup>71</sup> Dixon op cit note 8 at 116.

<sup>72</sup> Crawford op cit note 15 at 42.

<sup>73</sup> Ibid at 89; Article 4 (1) supra note 42.



Significant to note in contemporary international law is the interplay of other factors revolving around human rights and self-determination. These have been advocated for that for an entity to claim statehood; it should satisfy the standards and expectations of the international community in line with these issues.<sup>74</sup> This expansion received support from the Guidelines on Union drawn-out by the European Community (EC) in 1991.<sup>75</sup> It also extended to Yugoslavia which required recognition of States to be dependent on compliance with norms of international law relating to self-determination, respect for human rights and the protection of minorities.<sup>76</sup>

From a legal point of view, the added legal criteria are illegitimate because they have not yet been passed into customary law and there is still less support both among legal scholars and State practice. These divided views have developed into a greater debate on recognition and the creation of States in international law.

## V. RECOGNITION OF STATES – THE GREAT DEBATE IN CONTEMPORARY INTERNATIONAL LAW

Regardless of the general perception, the attitude of existing States play a major role in legal arguments related to statehood in contemporary international law. It is to be understood that for an entity to become a State, it requires more than just a declaration of independence by a new State but existing States have to acknowledge its status.<sup>77</sup> This is done through an act of recognition.

Recognition signifies a State's response to certain factual situations which is a formal notice taken of new States or governments, a declaration that rebellious groups are belligerents or revolutionaries, grant of diplomatic or representative status to particular persons and the acknowledgement of changes of sovereignty over territories.<sup>78</sup> The legitimacy of recognition is to create an *estoppel* which means that the recognising State is bound by its act of recognition.<sup>79</sup>

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<sup>74</sup> John Dugard *SC International Law: A South African Perspective* 4 ed (2011) 83 - 84.

<sup>75</sup> European Community: *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States* 31 ILM (1992) 1485.

<sup>76</sup> Dugard op cit note 74 at 85.

<sup>77</sup> Bennett & Strug op cit note 4 at 70.

<sup>78</sup> Ibid.

<sup>79</sup> Christopher Brown 'A Comparative and Critical Assessment of Estoppel in International Law' (1996) 50 *University of Miami Law Review* 369 at 369.

Whether creation of a new State is dependent on or independent of recognition by existing States or should an entity be considered a State under international law despite the fact of not being recognised by the existing State, remains a debatable legal question of contemporary international law.<sup>80</sup>

Although normally influenced by political reasons, recognition by existing States has considerably factored as a great debate on the creation of States in international law.<sup>81</sup> The debate is centred on the two different schools of thoughts which are the constitutive and declaratory theories. The reasons found difficult to resolve the argument over State recognition theory is that political opinions are often transformed into legal questions to be addressed in international legal system.<sup>82</sup>

But States are free to adjust to political changes and have no obligation to recognise an entity that has fulfilled the objective criteria of statehood. However, State practice has not supported this attitude.<sup>83</sup> On the contrary, States are obliged to desist from recognising situations arising from the breach of international law.<sup>84</sup> This obligation has not yet been established in customary law because the obligation is generally not drawn from a subjective logic of *opinion iuris* but reasonably from resolutions by organs such as the UN Security Council (SC) under Chapter VII of the UN Charter.<sup>85</sup>

On the other hand, claims of admission to the UN membership constitute existence of a State and consequences of constitutive and declaratory theory debates arise. This is due to arbitrary and subjective individual State decisions by individual UN Member States decision is superseded by which collective decision of the UN members States. In other instances, a new State may be prematurely recognised before all the factual criteria for recognising an entity as a State have been fulfilled. While the parent State may consider recognition as an aggressive political act, a new entity will find it a welcome method of international protection.<sup>86</sup>

In Africa, recognition as a factor has been demonstrated in the failure of declared independent entities such as the Transkei, Bophuthatswana, Venda and Ciskei (TBVC

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<sup>80</sup> Erhan Bora 'Cyprus in international law' (2013) 6 *Ankara Bar Review* 27 at 48.

<sup>81</sup> Malcom N Shaw QC *International Law* 6 ed (2008) 198.

<sup>82</sup> Brownlie op cit note 60 at 88

<sup>83</sup> Bennett & Strug op cit note 4 at 71.

<sup>84</sup> Ibid.

<sup>85</sup> The presence of South Africa in Namibia (UN Doc RES/276 (1970)); The unilateral declaration of independence by the white minority governments of Rhodesia (UN Doc S/RES/221 (1996)).

<sup>86</sup> Bennett & Strug op cit note 4 at 71.

States). It followed that South Africa, although through its legislature granted independence to TBVC States in 1976, the United Nations called upon all its member States not to recognise the TBVC States. This was on account that other than South Africa, these States were not recognised by any other State in the international community.<sup>87</sup> In Europe, the Turkish Republic of Northern Cyprus (TRNC) remains in a legal state of limbo as its statehood has not been achieved due to non-recognition.

## VI. RECOGNITION THEORIES

According to recognition theory, the rights and duties relating to statehood are based on recognition by existing States. During the eighteenth century, States existed and was assumed to be founded on its internal sovereignty and did not require recognition from existing States.<sup>88</sup>

Kreijen argued that, ‘recognition ultimately enables a political community to accept the rights and obligations established by international law but the community concerned decides the extent it would bind itself.’<sup>89</sup> In Kreijen’s view, recognition served as a means of exclusion during the colonial period whilst in contemporary international law, recognition is principally a means of inclusion of an entity in the international community, guaranteeing the new State with equal rights and obligations of a sovereign State.<sup>90</sup>

Nonetheless, the tension between concepts of recognition being a legal act in international law and assumptions in the political domain that recognition is a matter of choice continue to exist. Brownlie is correct when he argued that the political act of recognition is the pre-condition to achieving international legal personality; that in its extreme form, the legal personality of a State is hang on political consent and recognition by existing States.<sup>91</sup> As a matter of principle, the effect is impossible to accept. Certainly, States on their own cannot separate judgement or establish any competence of other States which is recognised by international law and independent of an agreement.<sup>92</sup>

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<sup>87</sup> As quoted by Crawford ‘The Status of Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1979 and; the Status of Ciskei Act 100 of 1979.

<sup>88</sup> Crawford op cit note 15 at 10.

<sup>89</sup> Gerard Kreijen *State Failure, Sovereignty, and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa (Developments in International Law)* (2004) 13.

<sup>90</sup> Ibid at 14

<sup>91</sup> Brownlie op cit note 60 at 87 – 88.

<sup>92</sup> Ibid at 89.

Two grounds of recognition theory are found; whether the new State exists before recognition by existing States and secondly, the degree of discretion that States have to grant or withhold recognition.<sup>93</sup> Shaw argued that, ‘the decision whether to recognise or not is generally dependent upon political views rather than legal grounds’.<sup>94</sup> According to Shaw’s definition, recognition is a ‘statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation’.<sup>95</sup>

It is evident that determining a subject of international law becomes more significant because contentious issues arise. In *S v Banda Friedman J* said that,

‘The constitutive theory, founded on recognition, contains variables which are rooted in political, ideological and economic motives which cannot, in law, serve as a basis for determining the existence of a legal entity.’<sup>96</sup>

So, once recognition occurs, applicable international legal consequences which constitute ‘participation in the international legal process ....’ follows.<sup>97</sup> But rather than expressing views, a system to determine a State in international law must be established to resolve contentious issues

#### *a) The constitutive theory*

According to this theory, the rights and duties relating to statehood are based on recognition by existing States and that an entity claiming statehood becomes a State - a subject of international law through recognition.<sup>98</sup> This approach is founded on the shift from natural law to positivist theory of international law doctrine which is centred on consent as an essential element of State creation.<sup>99</sup> Recognition bears constitutive effect because it is a necessary pre-condition for the establishment of the State concerned.<sup>100</sup> The strict constitutive position was adopted by Oppenheim and other positivists who expressed that:

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<sup>93</sup> William Thomas Worster ‘Law, politics, and the conception of the state’ (2009) 27 *Boston University International Law Journal* 115 at 123.

<sup>94</sup> Shaw op cit note 81 at 445.

<sup>95</sup> Ibid.

<sup>96</sup> *S v Banda* supra note 48 at 538.

<sup>97</sup> Ibid.

<sup>98</sup> Article 3 supra note 3.

<sup>99</sup> Dimitrios Lalos ‘Between statehood and Somalia: Reflections of Somaliland statehood’ (2011) 10 *Washington University Global Studies Law Review* 789 at 799.

<sup>100</sup> Lassa Oppenheim *International Law* 8 ed (1955) para 71 in ‘D. J Harris *Cases and Materials on International Law* 6 ed (2006) 105.

‘The formation of a new State is ... a matter of fact, and not of law. ...as soon as recognition is given, the new State’s territory is recognised as the territory of a subject of international law, and it matters not how this territory is acquired before recognition.’<sup>101</sup>

A further persuasive expression is by Lauterpacht who argued that,

‘The full international personality of raising communities ... cannot be automatic ... as is ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of the preferred solution ... the latter must be fulfilled by States already existing.’<sup>102</sup>

While Lauterpacht stated that recognition is constitutive,<sup>103</sup> Brownlie argued that ‘recognition is an optional and political act will of a State.’<sup>104</sup> According to Crawford’s explanation, Lauterpacht’s argument is that two orthodox of constitutive theory are distinguished. Prior to recognition, the community in question has no rights and obligation as subjects of international law; and that recognition is entirely at political discretion and not a legal duty owed to the community.<sup>105</sup>

The substantial element of the constitutive view is subjective to what is in accordance with the recognising State's interests.<sup>106</sup> Under international law, rights are not dependent upon recognition of the right-holder by the other individual; an entity is recognised because it is a State.<sup>107</sup> Recognition is therefore, only an acceptance, a response to, an acquiescence of what already exists.<sup>108</sup> The Restatement of Foreign Relations Law concisely brings it out that ‘an entity that satisfies the requirements of the definition of a State is a State whether or not its statehood is formally recognised by other States.’<sup>109</sup>

However, some scholars have argued that the act of recognition, although maybe centred on legal criteria, recognition is influenced by political, economic and legal consideration.<sup>110</sup> For example, even though Saharan Arab Democratic Republic (Western Sahara) is a member of the African Union, Morocco declined to recognise that State because it has a claim of that

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<sup>101</sup> Ibid at 373.

<sup>102</sup> Hersch Lauterpacht ‘*Recognition in International Law*’ (1944) 53 *Yale Law Journal* 385 at 437.

<sup>103</sup> Brownlie op cit note 60 at 86.

<sup>104</sup> Ibid.

<sup>105</sup> Crawford op cit note 15 at 20.

<sup>106</sup> Ibid *S v Banda* at 538

<sup>107</sup> Crawford op cit note 15 at 93.

<sup>108</sup> *S v Banda* supra note 48 at 538.

<sup>109</sup> Restatement (Third) of Foreign Relations Law of the United States 202 cmt. b (1987).

<sup>110</sup> Dixon op cit note 8 at 127.

territory.<sup>111</sup> The same situation is more prominent particularly when there is a civil war in an existing State.<sup>112</sup>

Besides, while Brownlie argues that recognition can be viewed as constitutive for the recognised State because it is a condition for creation of formal diplomatic relations with the new State,<sup>113</sup> Shaw argues that the act of recognition is lawfully constitutive because rights and obligations of States do not automatically result from recognition.<sup>114</sup> He further argued that, even if an entity claiming statehood is non-recognised, this would not amount to a conclusive argument against its statehood.<sup>115</sup> It is argued that, where the recognising government is not acting in an opportunistic manner, recognition is authoritative evidence of legal status.<sup>116</sup>

The constitutive theory has some degree of implicit support by State practice. However, there is necessarily no evidence of customary international law because the logic tends to be difficulty to explain as other scholars have expressed their explanations for *opinio juris*.<sup>117</sup> States misinterpret circumstances and may cause unintended significances. Kreijen correctly concluded that ‘since the act of recognition is alleged as generating a distinct legal effect which is creation of a State, it is a legitimate act.’<sup>118</sup>

#### *b) The declaratory theory*

Contrary to the constitutive theory, the declaratory theory of recognition is conventionally founded on Article 3 of the Montevideo Convention which provides: ‘The political existence of the State is independent of recognition by other States.’<sup>119</sup> The initial decision to recognise a State in objective reality appears to have been designed on this test.<sup>120</sup> Oppenheim shares his views when he explains the relation between the concept of statehood and recognition. He said;

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<sup>111</sup> Dixon op cit note 8 at 127.

<sup>112</sup> See *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA* (1993) 1 ALL ER 371.

<sup>113</sup> Brownlie op cit note 60 at 89

<sup>114</sup> Shaw op cit note 81 at 446.

<sup>115</sup> Ibid.

<sup>116</sup> Crawford op cit note 15 at 93.

<sup>117</sup> Worster op cit note 93 at 135.

<sup>118</sup> Kreijen op cit note 89 at 16

<sup>119</sup> Article 3 supra note 3.

<sup>120</sup> Robert J Delahunty & John Yoot ‘Statehood and the Third Geneva Convention’ (2005) 46 *Virginia Journal of International Law* 131 at 142.

‘... Statehood itself is independent of recognition. International law does not say that a State is not in existence as long as it is not recognised, but it takes no notice of it before its recognition....’<sup>121</sup>

Crawford correctly espouses this foundation when he states that recognition of a new State is a political act. But according to Shaw’s analysis, recognition is simply an acceptance by States of an already existing situation.<sup>122</sup> Therefore, according to the declaratory theory, the creation of a new State is factual in that,

‘a State exists as a subject of international law - as a subject of international rights and duties - as soon as it ‘exists’ as a fact, that is, as soon as it fulfils the conditions of statehood as laid down in international law. Recognition merely declares the existence of that fact.’<sup>123</sup>

Supporter of this approach is Kreijen who argues that, ‘recognition serves as an official act of acknowledgment of a factual situation and thus is of a declaratory nature only.’<sup>124</sup> At this point, recognition could be rendered immaterial because the basis of statehood is rather factual than individual State option. Therefore, recognition should be automatic based on specified principal criteria.<sup>125</sup>

Although there is much support of the declaratory theory by modern scholars as well as arbitral practice, particularly the *Tinoco Arbitration* which suggests that recognition is simply evidence that the international law requirement are met, State practice does not because international rights on the international plane are not acquired automatically but are acquired after States are recognised.<sup>126</sup> Worster criticised this theory when he argues that the fact that recognition confers recognised States with rights alters States expectations and may adopt choices that would result into peace.<sup>127</sup> Worster is correct when he criticised this theory because existing States would not recognise a new State which would ruin the peaceful prevailing atmosphere of any State.

Recognition may however be unilaterally expressed or implied and/or collectively made by existing States

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<sup>121</sup> Lassa Oppenheim *International Law: A Treatise* 3 ed (1920) in Ronald F Roxburgh *The Law book Exchange* (2008) 133.

<sup>122</sup> As quoted by Crawford op cit note 15 at 22; Shaw op cit note 81 at 448.

<sup>123</sup> Lauterpacht op cit note 113 at 423

<sup>124</sup> Kreijen op cit note 89 at 15-16.

<sup>125</sup> Worster op cit note 93 at 119.

<sup>126</sup> Harris op cit note 2 at 45; Worster op cit note 93 at 119; *Great Britain v Costa Rica* 1923 (United States Supreme Court) 1 (RIAA) 369.

<sup>127</sup> Ibid Worster at 119.

c) *Methods of recognition*

i) *Unilateral express or implied recognition*

Unilateral recognition entails that an existing State recognises an entity claiming to be a State and that it satisfies the factual statehood requirement bearing the rights and duties of a State in international law.<sup>128</sup> State practice has shown that States are at liberty of adjusting to prevailing circumstances around them;<sup>129</sup> recognition is a matter of intention either by express or implied.<sup>130</sup>

Express recognition is when an existing State issues an official statement recognising an entity claiming statehood.<sup>131</sup> For example, the government of the United Kingdom in 1950 expressed recognition of Israel as a sovereign State by declaring that, 'His Majesty's Government have decided to accord *de jure* recognition to the State of Israel.'<sup>132</sup>

On the other hand, implied recognition is when an existing State performs certain conducts such as establishing diplomatic offices, hosting of and sending diplomatic representatives to an entity claiming statehood, acknowledging a flag or concluding treaties with an entity claiming statehood.<sup>133</sup>

Dugard argued that while recognition maybe indirect through exchange of diplomats, it should not be inferred from an exchange of consular proxies or the fact that the States are parties to multilateral treaties or being members of the same organisation.<sup>134</sup> For instance, the United Kingdom tacitly established diplomatic relations with Namibia in 1990 but did not accord Namibia formal recognition of statehood.<sup>135</sup> Under international law, conducting relations with a particular entity may be considered as recognition of that entity as a State. However, specific circumstances under which such relations are conducted must comprehensively and clearly be examined.

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<sup>128</sup> Dugard op cit note 74 at 90.

<sup>129</sup> Hersch Lauterpacht *Recognition in International Law* (1947) 51.

<sup>130</sup> Brownlie op cit note 60 at 93.

<sup>131</sup> Bennett & Strug op cit note 4 at 70.

<sup>132</sup> Arsalan Haji Issa Al-Mizory *Towards a New Understanding of the Right of Self-Determination in the Post-Colonial Context: The case of the Iraqi Kurdistan Region* (PhD Thesis, Bangor University 2014)

<sup>133</sup> As quoted in Bennett & Strug op cit note 4; *Republic of China v Merchants' Fire Assurance Corp* (1929) (30F) 2 para 278.

<sup>134</sup> Dugard op cit note 74 at 94.

<sup>135</sup> Brownlie op cit note 60 at 93.



ii) *Collective recognition*

Although contentious and unclear, collective recognition is another form of recognition. This recognition may take the form of a joint declaration by a group of States<sup>136</sup> or when a group of existing States – for example, the African Union (AU), European Union (EU) or the United Nations (UN) directly infers recognition of the existence of a new State by an act of recognition or indirectly through admission of the new State to the organisation.<sup>137</sup>

Contention arises on whether admission to the UN constitutes recognition. Admission to UN membership is *prima facie* evidence of statehood and member States not recognising the new State risk their membership by disregarding the fundamental rights of the new existing State.<sup>138</sup> The UN Charter identifies two categories of members – the original and subsequent new members. Article 3 of the UN Charter provides:

‘The original Members of the United Nations shall be the States ... or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.’<sup>139</sup>

Subsequent membership is provided in Article 4 of the UN Charter:

‘1. Membership in the United Nations is open to other peace-loving States which accept the obligations contained in the present Charter ....’<sup>140</sup>  
2. The admission of any such State to membership in the Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.’<sup>141</sup>

Although membership to the UN is limited to States only (according to the wording of Articles 3 and 4 of the UN Charter), the numerous reference to ‘States’ in the two articles is an indication that the rights and obligations protected in the UN Charter are connected to statehood.<sup>142</sup> In contemporary international order, since the Charter affirmed self-determination of people<sup>143</sup> which has become a principle of significance, some of the requirements of statehood for the purpose of admission to the United Nations have become flexible.<sup>144</sup>

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<sup>136</sup> Ibid.

<sup>137</sup> Dugard op cit note 74 at 95

<sup>138</sup> Brownlie op cit note 60 at 94.

<sup>139</sup> Article 3 supra note 42.

<sup>140</sup> Ibid Article 4(1).

<sup>141</sup> Ibid Article 4(2).

<sup>142</sup> Dugard op cit note 74 at 95.

<sup>143</sup> Article 1(2) and 55 supra note 42.

<sup>144</sup> Dugard op cit note 74 at 93.

There are currently 193 member States of the United Nations<sup>145</sup> and its only Israel whose statehood is still denied by some Arab nations. The UN organs have dependably assumed that Israel is protected by the Charter principles on the use of force against her Arab neighbours.<sup>146</sup> However, all UN member States are accepted as States despite the fact that several of them could not have received wide recognition by other States had the ball been left in the courts of other States to determine their statehood.<sup>147</sup>

Against this background, admission to the UN does not constitute recognition as such and cannot alone provide a definite answer to the question of statehood in international law. This is because while some entities have been admitted to the UN membership, they are not recognised as States – for instance Zanzibar and Palestine (although this poses different statuses).

Not until 2002 was Switzerland a UN Member State despite having been recognised by majority of the international community many years ago. Certainly, Switzerland was a State before its admission to UN membership. Moreover, nothing in customary law or the Charter itself requires a non-recognising State to give ‘political’ recognition and to enter into relations with another member.<sup>148</sup>

### iii) *Collective non-recognition*

Non-recognition was founded on the doctrine of *ex injuria jus non oritur*.<sup>149</sup> The doctrine originated from Manchukuo’s non-recognition as a State. Manchuria, a Chinese province was invaded by the Japanese in 1932 and established Manchukuo which was declared a State.<sup>150</sup> Stimson, the Secretary of States declared that the United States of America will not recognise any treaty entered into between China and Japan that damaged Chinese’s territorial sovereignty and integrity.<sup>151</sup> Manchukuo’s declaration as a sovereign State is viewed unsuccessful. This is evidenced in the League of Nations’ Assembly’s passing of a resolution calling upon its Member States not to recognise Manchukuo.<sup>152</sup>

<sup>145</sup> Connie de la Vega *Dictionary of International Human Rights Law* (2013) page 149.

<sup>146</sup> Ibid; Recognition of Israel’s statehood maybe a fact that none of the non-recognising Arab States were permanent members of the Security Council with the power to veto Israel’s admission to the UN.

<sup>147</sup> Dugard op cit note 74 at 94

<sup>148</sup> Brownlie op cit note 60 at 94

<sup>149</sup> Dugard op cit note 74 at 96

<sup>150</sup> David Turns ‘The Stimson Doctrine of non-recognition: Its historical genesis and influence on contemporary international law’ (2003) 2 *Chinese JIL* 105 at 114.

<sup>151</sup> Bennett & Strug op cit note 4 at 72.

<sup>152</sup> Dugard op cit note 15 at 33.

The failed declared independent entities of Transkei, Bophuthatswana, Venda, Ciskei (TBVC States) and the Turkish Republic of Northern Cyprus (TRNC) to successfully achieve their statehood is as a result of non-recognition. Rudrakumaran also argued that, the Soviet governments in the Baltic States were illegitimate puppet regimes and the collective non-recognition events surrounding the Japanese occupation and control of Manchuria is constitutive theory approach.<sup>153</sup> This is demonstrated if a claimed State is excluded from the international plane by most States. The claimed State might be unable to assert its legal personality, such that it is rendered unsuccessful and non-independent.<sup>154</sup>

According to Lauterpacht, ‘non-recognition is based on assumption that acts contrary to international law are unacceptable and cannot become a source of legal rights for the wrong doer.’<sup>155</sup> That assumption applies to international law as one of the ‘general principles of law recognised by civilised nations.’<sup>156</sup>

The concept that there were peremptory norms (*jus cogens*) of international law was new when the doctrine of non-recognition was first developed.<sup>157</sup> In today’s contemporary international law, it is accepted that certain peremptory norms are founded on which under no circumstance derogation is permitted.<sup>158</sup> Contemporary international law acknowledges development of this doctrine in that violation of a norm of *jus cogen* is illegal and position is applicable to the creation of States.<sup>159</sup> In the *Namibia Advisory Opinion*, the ICJ stated that, ‘States are no under a duty to recognise such acts under customary international law and in accordance with the general principles of law.’<sup>160</sup> It is evident that the resolution passed by the League of Nations Assembly in Manchukuo’s case, or resolutions by the United Nations Security Council (UNSC) confirms the already existing duty of States not to recognise such acts in international law.<sup>161</sup>

Moreover, the International Law Commission validated the doctrine of non-recognition in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS).<sup>162</sup> Articles 40 and 41 of DARS provide that, ‘... no State shall recognise as lawful a

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<sup>153</sup> Visuvanathan Rudrakumaran ‘The legitimacy of Lithuania’s claim for secession’ (1992) 10 *Boston University International Law Journal* 33 at 39.

<sup>154</sup> Ibid at 40.

<sup>155</sup> Dugard op cit note 74 at 96.

<sup>156</sup> Lauterpacht op cit note 113 at 419.

<sup>157</sup> Dugard op cit note 74 at 96.

<sup>158</sup> See Friedman J in *S v Banda* supra note 48 at 544 F.

<sup>159</sup> Dugard op cit note 74 at 97

<sup>160</sup> *Namibia Advisory Opinion* 1971 ICJ Rep 16 at 54.

<sup>161</sup> Dugard op cit note 74 at 97.

<sup>162</sup> Report of the International Law Commission, General Assembly Official Records, 56<sup>th</sup> Session supplement 10 (A/56/10) (2001).

situation created by a serious breach of an obligation arising under a peremptory norm of general international law'.<sup>163</sup>

For purposes of non-recognition, peremptory norms recognised by the United Nations are prohibition on aggression (Iraqi's invasion of Kuwait in 1990); the acquisition of territory by use of force (Israel's annexation of East Jerusalem and the Golan Heights in 1980 and 1981); systematic racial discrimination and the suppression of human rights (Rhodesia and the Bantustan) and the denial of self-determination (Katanga, Namibia and the Bantustan).<sup>164</sup>

An example of collective non-recognition is the South African's Bantustan entities of (TBVC).<sup>165</sup> When the Bantustan entities declared independence in 1976, the General Assembly of the United Nations condemned the establishment of Bophuthatswana as a State and called upon its Member States not to recognise the independence of TBVC entities as States.<sup>166</sup> The General Assembly's reasoning was that these entities violated several peremptory norms in the field of self-determination and human rights.<sup>167</sup>

Taking into consideration the United Nations' victories in administering non-recognition by condemning unilateral declared independent States such as Rhodesia, the TBVC and the TRNC through resolutions, could be understood as a success of the organisation and its Member States; as such, it is assumed that this practice will soon be turned into customary law.

## VII. CONCLUSION

This chapter has provided an overview of the doctrine of statehood in early international law and how it has developed in contemporary international law. It has demonstrated that the concept of statehood is a contentious issue which is still far from being settled in international law. Satisfying the Montevideo criteria does not guarantee entity recognition as a State and neither does failure to satisfy the Montevideo criteria preclude an entity from achieving statehood.

<sup>163</sup> Article 40 and 41 of Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

<sup>164</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* 2004 ICJ Rep 136 para 163; EC Guidelines on Recognition of States (1991) 62 *BYIL* 559; Worster op cit note 93 at 134; Security Council Res. 661, UN Doc. S/RES/661 (Aug. 6, 1990) (implementing measures to restore Kuwaiti government).

<sup>165</sup> See the Commentary on Draft Articles 41 of the ILC Report on the Responsibility of States at 289 para 8. (A/56/10) (2001).

<sup>166</sup> General Assembly Resolution 32/105N (1977).

<sup>167</sup> Dugard op cit note 74 at 98. See also Dugard op cit note 15 at 110.

Although the creation of States has foundation on the Montevideo criteria, the laid down criteria are now non-exhaustive as other criteria have been suggested. However, the suggested criteria are illegitimate and need more time to develop. Neither the constitutive theory nor declaratory theory of recognition substantively fulfils contemporary practice in international law. However, Simson's doctrine has enduring effects in modern international law. The two examples of Manchukuo and the TRNC reveal that the constitutive theory is the most preferred theory regarding the international legal effect of recognition in contemporary State practice. Therefore, the constitutive theory is the correct approach to creation of States. This is because not until an entity has been recognised as such by other States, a State does not exist in international law. Lauterpacht rightly asserted;

‘it is not an automatic test of factual existence, but only recognition by other States ..., that can answer the question of the legal existence of a State as a subject of international law’.<sup>168</sup>

It is concluded that while the declaration theory is supported by case law, treaties as well as contemporary legal scholars, State practice support the constitutive theory. Since customary rules are founded on State practice, the constitutive theory of recognition will soon be passed into customary law.

In the next chapter, I will analyse the theory of secession and examples of successful and unsuccessful attempts at secession will be analysed.

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<sup>168</sup> Turns op cit note 148 at 141.

## CHAPTER III: SECESSION, SELF-DETERMINATION AND STATEHOOD

### I. INTRODUCTION

Beyond the colonial context, the creation of new States and secession are among the most significant in international law. The notion of secession is intertwined with the right of self-determination and these two concepts are normally discussed alongside each other.

Secession is one of the methods on which States are created.<sup>169</sup> In relation to self-determination, secession has until recently been the most common conspicuous mode of creation of States in contemporary international law and remains a controversial issue.<sup>170</sup> Numerous attempts at secession are still disputed if not unsuccessful – for example the failed secession attempts in Chechnya, the Republika Srpska, Katanga, Biafra and Somaliland are not isolated cases still under contention.<sup>171</sup> Other unsuccessful attempts at unilateral secession include Tibet's attempted secession from China, Bougainville's attempted secession from Papua New Guinea, Kashmir's attempted separation from India, both Abkhazia's and South Ossetia's secession attempts from Georgia.<sup>172</sup>

Unilateral secession has also remained as an object of disagreement among legal scholars. While some legal scholars interpret secession narrowly, others take a broader view of its definition. A case could be narrowly considered as secession whereas the same case in a broader way may be regarded as dissolution.<sup>173</sup> This lack of uniformity in definition has significant consequences.

According to Dahlitz's suggestion,

‘the issue of secession arises whenever a significant proportion of the population of a given territory, being part of a State expresses the wish by word or by deed to become a sovereign State in itself, or to join with and become part of another sovereign State.’<sup>174</sup>

Against this backdrop, some legal scholars view secession as an illegal action in that the act violates territorial integrity of an existing State. According to *Kosovo Advisory Opinion*, the International Court of Justice (ICJ) stated that the illegality of secession is only

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<sup>169</sup> Crawford op cit note 15 at 375.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid.

<sup>173</sup> Ioana Cismas ‘Secession in Theory and Practice: the Case of Kosovo and beyond’ (2010) 2 *Gottingen Journal of International Law* 531 at 337.

<sup>174</sup> Julie Dahlitz (ed.) *Secession and International Law: Conflict Avoidance - Regional Appraisals* (2003) 6.

present when there is violation of a fundamental norm of international law, in particular that of a peremptory character (*jus cogens*).<sup>175</sup> Territorial integrity of States is a norm of *jus cogens* and the unilateral character of a declaration of independence alone does not bring secession within the scope of illegality when consent from the parent State exists.<sup>176</sup> While Crawford submits that secession is ‘the creation of a State by the use or threat to use force without the consent of the former sovereign’,<sup>177</sup> Kohen asserts that secession is;

‘... the creation of a new independent entity through the separation of a part of the territory and population of an existing State without the consent of the latter. ... in order to be incorporated as part of another State’.<sup>178</sup>

Owing to consent requirement from the parent State, Dahlitz argues that secession becomes complex when there is opposition by the parent State and such objections play a fundamental role because the parent State has a right to respect of its territorial integrity.<sup>179</sup> In cases such as Eritrea, Montenegro, Singapore, South Sudan and the Union of Soviet Socialist Republics (USSR) where secession has been successful, parent States waived their rights and permitted secession by consent.<sup>180</sup>

Under international law, entities such as Somaliland, although unilaterally seceded outside the context of colonialism, as long as the parent State, Somalia does not renounce its right to respect of its territorial integrity, Somaliland had no right to unilaterally secede and become a State.<sup>181</sup> As it was also confirmed by the Supreme Court of Canada (SCC) in the *Quebec* case, the right of self-determination outside colonialism does not equal a right to independence.<sup>182</sup>

#### a) *Defining Secession*

According to Crawford, secession is ‘the process by which a particular group seeks to separate itself from the State to which it belongs and to create a new State’.<sup>183</sup> The most cited example on secession, *Reference re Secession of Quebec* in the Canadian Supreme Court

<sup>175</sup> *Advisory opinion: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* 2010 ICJ Rep 141 para 81.

<sup>176</sup> Jure Vidmar ‘Unilateral Secession in a Multipolar World’ 2013 *Soc’y Int’l L Proc.* 213 at 215.

<sup>177</sup> Crawford op cit note 15 at 375

<sup>178</sup> Kohen op cit note 7 at 1 - 3.

<sup>179</sup> Patrick Dumberry ‘Unilateral Secession in a Multipolar World’ 2013 *Soc’y Int’l L Proc.* 213 at 213.

<sup>180</sup> Ibid at 213.

<sup>181</sup> Dumberry op cit note 179 at 213

<sup>182</sup> *Reference re Secession of Quebec* 1998 (2) SCR (Can) 217 para 126.

<sup>183</sup> James Crawford ‘State practice and international law in relation to secession’ (1998) 69(1) *British Yearbook of International Law* at 85.

(SCC) defined the concept as follows: ‘When a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.’<sup>184</sup> However, the court underscored that ‘it remains unclear whether this ... proposition actually reflects an established international law standard.’<sup>185</sup> It is evident from the court’s ruling that the issue of secession was not resolved. While some legal scholars have argued in favour of secession, many have admitted that secession is not established in international law. However, there is also no rule of international law prohibiting unilateral secession.<sup>186</sup> In the *Kosovo Advisory Opinion*, the ICJ stated that;

‘In many cases, territorial integrity has been a significant restriction and since 1945, the international community has been hesitant to accept unilateral secession of territorial units if the secession is opposed by an existing State from which an entity is seceding.’<sup>187</sup>

Crawford concluded that, since 1945, no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the Predecessor State.<sup>188</sup> However, the general unanimity regarding self-determination is that secession in and of itself is ‘neither legal nor illegal’ in international law, but a legally neutral act, the consequences of which are regulated internationally’.<sup>189</sup>

#### *b) Unilateral secession and international law*

A number of constituent entities have successfully or unsuccessfully seceded from their parent States in pursuit of exercising their right of self-determination. For example, Somaliland seceded from Somalia; South Sudan seceded from Sudan while Eritrea seceded from Ethiopia. In all these cases, the entities declared themselves as sovereign independent States at different intervals.

Generally, unilateral secession is secession without negotiation ....<sup>190</sup> International law neither grant component territorial entities a right to secede from their parent States nor

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<sup>184</sup> *Reference re Secession of Quebec* supra note 182; League of Nations Official Journal ‘Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question’ (1920) 3 para 134.

<sup>185</sup> Ibid para 135.

<sup>186</sup> Crawford op cit note 15 at 390; Dumberry op cit note 179 at 213.

<sup>187</sup> The International Court of Justice's Kosovo Case: Assessing the Current State of International Legal Opinion on Remedial Secession (2010) 48 *The Canadian Yearbook of International Law* 215 at 220.

<sup>188</sup> Crawford op cit note 15 at 390

<sup>189</sup> Ibid at 390

<sup>190</sup> *Reference re Secession of Quebec* supra note 182 para 155.



prohibit secession.<sup>191</sup> In the nineteenth century legal scholars assumed that international law neither clearly prohibits nor recognises the right of an ethnic group to unilaterally secede from a parent State.<sup>192</sup> In the *Kosovo's Advisory Opinion*, the ICJ decided that unilateral declarations of secession are not by themselves unlawful under international law.<sup>193</sup> The UN Charter affords a mechanism that enables a legal violation of the territorial integrity of a certain State. It does however not make reference to territorial integrity of States in circumstance of attempts at secession.<sup>194</sup>

A reference to attempts at secession seems to be founded in the Declaration on Principles of International Law. In the legal framework of the right of self-determination, the Declaration provides for an exception to protection of territorial integrity which is the right to internal self-determination and provides:

‘Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity ... sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... representing the whole people belonging to the territory without distinction as to race, creed or colour.’<sup>195</sup>

Subsequently, in the *Quebec* case, the SCC held that the right of colonial peoples to external self-determination is undisputed. The court concluded that;

‘the international law right to self-determination only generates at best, a right to external self-determination in situations of former colonies; where a people is oppressed ... or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development’.<sup>196</sup>

In the context of the general finding, the court observed that under international law, no right of unilateral secession was available.<sup>197</sup> The emergence of a new State disrupts the territorial integrity of its parent State. It could be construed as being creative of an obligation to withhold recognition of an entity seeking unilateral secession because in some

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<sup>191</sup> Peter Roethkeure ‘The Right to secede under international law: The case of Somaliland (2011) *Journal of International Service* 35 at 38.

<sup>192</sup> Crawford op cit note 15 at 5.

<sup>193</sup> *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* 2010 ICJ Advisory Opinion para 122.

<sup>194</sup> Vidmar op cit note 176 at 215

<sup>195</sup> The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (24 October 1970) 121, annex, principle 5.

<sup>196</sup> *Reference re Secession of Quebec* supra note 182 para 138.

<sup>197</sup> Jure Vidmar ‘Conceptualizing declarations of independence in international law’ (2012) 32 *Oxford Journal of Legal Studies* 153 at 162.

circumstances, States are obliged to withhold recognition'.<sup>198</sup> However, Cassese argues that, while majority of scholar's view have divergent and objective views to secession; secession 'is a fact of life, outside the realm of law'.<sup>199</sup> Outside the concept of decolonisation, the fact that secession cannot be achieved without having effects on territorial integrity which is an issue of international law, then secession is not a fact of life but law.

*c) Secession and State practice*

State practice confirms that the unilateral character of secession does not make a declaration of independence illegal. This was confirmed in the *Quebec* case where the SCC argued that a new State could emerge unilaterally but the definitive success of State creation would depend on international recognition. Furthermore, the court stated that foreign States would so consider the legality and legitimacy of the claim to independence.<sup>200</sup>

In contemporary international law, East Pakistan in its quest to exercising self-determination successfully seceded and declared independence from Pakistan in 1971.<sup>201</sup> It is argued that there were unusual factual circumstances that prompted this secession; as such, it was considered as a last resort.<sup>202</sup> Outside the colonial context, secession has been rare and State practice is particularly reluctant to recognise unilateral secession entities.<sup>203</sup> This is because some legal scholars observe the concept as irrelevant to people entitled to self-determination in post-colonial era.<sup>204</sup> Koskenniemi argued that 'secession was compliance, and opposing rupture of old colonial State was unlawful'.<sup>205</sup>

However, in many cases, hitches arise when it has been identified that minorities of an entity are entitled to self-determination which may entail a right to unilateral secession. The UN has also supported secession only in cases where colonial authorities have threatened the right of self-determination.<sup>206</sup> Even so, the UN has in some cases declined to endorse claims of secession. For example, despite reports of serious violations of human rights against

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<sup>198</sup> Ibid.

<sup>199</sup> Antonito Cassese *Self-Determination of People, A legal Reappraisal* (1995) 123.

<sup>200</sup> Vidmar op cit note 177 at 215.

<sup>201</sup> M Rafiqul Islam 'Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh' (1985) 22 *Journal of Peace Research* 211 at 216.

<sup>202</sup> Ibid at 216.

<sup>203</sup> Al-Mizory op cit note 132 at 114.

<sup>204</sup> Ibid.

<sup>205</sup> Martti Koskenniemi 'National self-determination today: Problems of legal theory and practice' (1994) 43 *International and Comparative Law Quarterly* 241 at 249 -250.

<sup>206</sup> Carolline E Foster 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *EJIL* 141 at 155.

Biafrans, the UN and the Organisation of African Unity (OAU) rejected Biafra's claim for independence in 1967; confirmation is contained in the UN Secretary-General U Thant's statement that, 'the United Nations has never accepted and does not accept ... the principle of secession of a part of its Member State.'<sup>207</sup>

In post-colonial era, Bangladesh was the first to successfully secede from Pakistan. But even so, Bangladesh was not admitted to the UN until Pakistan gave formal recognition to the State of Bangladesh some years after it was first recognised by other States.<sup>208</sup> The reason could probably be that entitlement of the right of self-determination or secession would compromise the 'sovereign equality' and 'territorial integrity' of existing members.<sup>209</sup> Even in cases where secession was prompted by serious human rights violations by any State, the international community has favoured the sovereignty and territorial integrity of the parent State.<sup>210</sup> This could also be explained that the significance of territorial integrity has taken precedence.

While Crawford argued that 'the wealth of State practice in the context of decolonisation demonstrating that the exercise of self-determination has in practice always taken place through agreement with the parent State,'<sup>211</sup> Foster argued that 'self-determination has been in the first instance a right to which the colonial authority must give effect'.<sup>212</sup> However, severe denial of a people's fundamental human rights of self-determination does not in itself automatically legitimate secession. In *re Quebec*, the SCC held that, '... when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled as a last resort to exercise it by secession'.<sup>213</sup>

Although ethically conventional, this assertion has not been passed as customary law through consistent State practice.<sup>214</sup> Arguably, in the *North Sea Continental Shelf Case*, the ICJ held that in order to prove the existence of a norm of customary international law,

'... State practice, including those States whose interests are specifically affected, should have been both extensive and virtually uniform...and should have occurred in

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<sup>207</sup> John Dugard & David Raič 'The role of recognition in the law and practice of secession' in Kohen 'Introduction' in Marcelo G. Kohen (ed) *Secession: International Law Perspectives* (2006) 102.

<sup>208</sup> Crawford op cit note 15 at 111.

<sup>209</sup> Article 2 (1) and 2 (4) supra note 42.

<sup>210</sup> Crawford op cit note 15 at 108.

<sup>211</sup> James Crawford 'State practice and international law in relation to unilateral secession' (1998) 85 *BYIL* 113.

<sup>212</sup> Foster op cit note 205 at 155.

<sup>213</sup> *Reference re Secession of Quebec* supra note 182 para 126.

<sup>214</sup> Al-Mizory op cit note 132 at 115.

such a way as to show a general recognition that a rule of law or legal obligation is involved'.<sup>215</sup>

In addition, considering the historical grievance theory, a secession claim to independence is only significant if there is substantial evidence that the entity's territory was unlawfully annexed into the parent State.<sup>216</sup> The fact that the international community did not regard Kosovo's incorporation into Serbia as an illegal annexation of territory precludes the applicability of this abstract theory to territorial entities such as Kosovo.

Where a people have been a subject of serious and systematic violation of human right, international law recognises the theory of remedial secession but this theory remains very controversial. The theory encompasses protection of individuals and minority rights with secession being an ultimate remedy.<sup>217</sup>

According to State practice, two distinguished circumstances should be met. First, consent between the secessionist entity and the parent State or remaining parties should exist of which in most cases, the international community has utmost authorised.<sup>218</sup> An example of this situation conducted on mutual terms is the separation of the Slovak and Czech Republic in 1993<sup>219</sup> as well as Eritrea and South Sudan. It is argued that the creation of these States does not amount to a precedent for secession.

Rather than holding a referendum for secession, Czech Republic's independence was as a result of a direct process of consensual dissolution achieved by parliamentary procedure under the Constitution Act of 1992.<sup>220</sup> Eritrea and South Sudan was as a result of referendum and subsequent consent by parent States. These two instances are not unilateral but consensual secession in that the parent States gave up their claims of territorial integrity.

However, in cases where authorities of the central State are against secession of a part of the territory, the reactions of the other States may have great influence to the solution of the problem.<sup>221</sup> Nonetheless, denial of fundamental human rights to group entitled to self-determination has been invoked in a number of cases.

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<sup>215</sup> *North Sea Continental Shelf* 1969 ICJ Rep para 74.

<sup>216</sup> Lea Brilmayer 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177 at 197.

<sup>217</sup> *Ibid.*

<sup>218</sup> Lee C Buchheit *Secession: The legitimacy of self-determination* (1978) 89-99.

<sup>219</sup> Dahlitz opt cit note 174 at 91.

<sup>220</sup> Crawford op cit note 15 at 106.

<sup>221</sup> Dahlitz opt cit note 174 at 91.

## II. SELF-DETERMINATION

Featuring more prominent in contemporary international law is the right of self-determination which is also a product of decolonisation. It plays an important role on the creation of States in post-colonial era.<sup>222</sup> While the concept of self-determination is generally recognised as a norm of customary international law, it however remains contentious due to its indistinguishable character and political nature.<sup>223</sup> This is because the principle of territorial integrity's supremacy has a bearing that limits the exercise of a right to self-determination.<sup>224</sup>

During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.<sup>225</sup> Self-determination is a legal right under international law and this is affirmed in the UN Charter of and given content in Resolution 1514 (XV) of 1950<sup>226</sup> and has been accepted as a 'norm' of *jus cogens*.<sup>227</sup>

Self-determination may be defined as a right of peoples under international law to exist and have access to government.<sup>228</sup> Article 1 (1) of the International Convention on Civil and Political Rights (ICCPR) contains a broad and clear definition of the right:

'All people have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural developments'<sup>229</sup>

<sup>222</sup> Antonio Cassese *Self-determination of Peoples: A Legal Appraisal* (1995) 42-46; Dugard op cit note 74 at 101.

<sup>223</sup> Ian Brownlie *Principles of Public International Law* (2003) 489; *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase) (*Belgium v Spain*) 1970 ICJ Rep 3 at 304. Article 1(2) of the UN Charter; Article 1 of the International Covenant on Civil and Political Rights (ICCPR) 1966; Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>224</sup> Laura Rees-Evans 'Secession and the use of force in international law' (2008) 4 *Cambridge Student Law Review* 249 at 249

<sup>225</sup> *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) ICJ Rep 1971 at 31 and 32, para 52-53; *East Timor (Portugal v Australia) Judgment* 1995 ICJ Rep at 102 para 29; *Advisory Opinion Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Rep 2004 (I) at 171-172 para 88.

<sup>226</sup> Article 1 supra note 42 para 55; Dugard op cit note 74 at 100; R McCorquodale 'South Africa and right of self-determination' (1994) 10 *SAJHR* 1 at 4.

<sup>227</sup> *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Second Phase) (*Belgium v Spain*) [1970] ICJ Rep 3 para 304

<sup>228</sup> Kathleen McVay 'Self-determination in new contexts: The self-determination of refugees and forced migrants in international law' (2012) 28 *Utrecht Journal of International and European Law* 36 at 37.

<sup>229</sup> Article 1 (1) of the ICCPR

Less detailed meaning is also found in Article 20 of the African Charter on Human and People's Rights (ACHPR) that, 'All people have a right to existence. They shall have an unquestionable and inalienable right to self-determination ....'<sup>230</sup>

In the context of self-determination, although a certain group of people within an existing State do not normally acquire a right to external self-determination – that is the right to secede, they do acquire a right to internal self-determination.<sup>231</sup> Internal self-determination denotes the right of a particular people to choose their political status within a State, to exercise meaningful political participation, or to preserve their cultural system.<sup>232</sup> Because internal self-determination does not contradict the principle of territorial integrity, it is the most preferred concept of self-determination.

#### *a) External self-determination*

As we have seen in the preceding section, external self-determination (secession) is contentious. This is because it conflicts with a number of fundamental norms of international law of which one of the most significant is the principle of territorial integrity.<sup>233</sup> Under Articles 2(4) and 2(7) of the UN Charter, territorial integrity is stated and suggests that self-determination cannot support an action that would dismember or impair the territory or political unity of a State.<sup>234</sup>

However, Resolution 2625 which, according to the ICJ reflects international legal custom states that, 'the principle of territorial integrity will not act to protect States that breach the principle of self-determination.'<sup>235</sup> In the *Advisory Opinion on Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the ICJ stated that,

'Article 1 common to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realisation of that right and to respect it, in conformity with the provisions of the United Nations Charter.'<sup>236</sup>

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<sup>230</sup> Article 20 of the ACHPR

<sup>231</sup> Ibid.

<sup>232</sup> Ibid; Milena Sterio *The Right to Self-Determination under International Law: Selfistans, Secession and the Rule of the Great Powers* (2013) 48.

<sup>233</sup> Kathleen McVay 'Self-determination in new contexts: The self-determination of refugees and forced migrants in international law' (2012) 28 *Utrecht Journal of International and European Law* 36 at 49.

<sup>234</sup> Resolution 1514 (1960) UN Doc A/RES/1514.

<sup>235</sup> Resolution 2625 (1970) UN Doc A/RES/2625; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, 171.

<sup>236</sup> Ibid at

We can see here that there exists uncertainty in respect of law. The right to territorial integrity and the right to self-determination are all enshrined in the UN Charter. In *Portugal v. Australia*, the court clearly said that the right of peoples to self-determination is today a right *erga omnes*.<sup>237</sup> However, in 1998, the SCC supported remedial secession in *Reference re Secession of Quebec* in which it gave a legal right of Quebec to secede from Canada. The court found that, ‘international law contains neither a right of unilateral secession nor the explicit denial of such a right’,<sup>238</sup> that ‘the right of a people is normally fulfilled through internal self-determination’; and that the right to external self-determination (secession) arises only in the most extreme cases’.<sup>239</sup>

It is argued that the SCC inferred a right to external self-determination (secession) in extreme cases where a people are found to be oppressed. In the *Katangese People v Zaire*, the African Commission on Human and People’s Rights held that, the Katangese people did not enjoy the right to secede because they failed to exhaust attempts to exercise greater internal self-determination and there was no evidence of oppression or human rights abuses on the part of the central government.<sup>240</sup> The Commission stated:

‘In the absence of a concrete evidence of violation of human rights to the point that the territorial integrity of Zaire should be called into question ..., Katanga is obliged to excise a variant of self-determination that is incompatible with the sovereignty and territorial integrity of Zaire’<sup>241</sup>

In addition, based on Resolution 2625 (XXV), the *Kosovo Advisory Opinion* is found to be in support of remedial secession. Judges Cancado Trindade and Yusuf both held that: ‘the right of a State to demand territorial integrity was lost when it failed to accord internal self determination to a people within its territory and violated a human right of such a people....’

<sup>242</sup> However, it is unclear whether the UN Member States collectively supported this opinion.

<sup>237</sup> *East Timor (Portugal v. Australia)* 1995 ICJ Rep at 102 para 29.

<sup>238</sup> *Reference re Secession of Quebec* supra note 182 para 120.

<sup>239</sup> Ibid para 126.

<sup>240</sup> *Katangese People v Zaire* (2010) AHRLR 72 (ACHPR 1995) (1996) 3 IHRR para 255-256.

<sup>241</sup> *Katangese Peoples' Congress v Zaire* Communique No. 75/92 (1995)

<sup>242</sup> *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* 2010 ICJ Rep para 177 – 81.

### III. SUCCESSFUL AND UNSUCCESSFUL ATTEMPTS AT SECESSION

Secession does not create problems where the parent State consents but problems arise where the government insists on respect of its territorial integrity. In practice, recognition plays a major role in determining the success of a particle secession.<sup>243</sup> In 2006, Montenegro peacefully seceded from its parent State, Serbia with the consent of Serbia. In the 2011 referendum, South Sudan overwhelmingly voted for independence from Sudan and the central government of Sudan accepted the decision. South Sudan is now an independent State.

Below are selected examples of successful and unsuccessful attempts at secession. Some provide evidences where secession is supported while others undermine any arguments for a right to secede - external self-determination in international law.

#### *a) Eritrea*

Eritrea was colonised by Italy from 1890 to 1941 after which became under control of Great Britain until 1952.<sup>244</sup> Under the auspice of the UN, Eritrea was merged with Ethiopia in 1952.<sup>245</sup> This was after the 1950 General Assembly Resolution 390 A (V) that established Eritrea as “an autonomous entity federated with Ethiopia under the sovereignty of the Ethiopian Crown”.<sup>246</sup> However, in 1962, the federation was unilaterally abolished and Ethiopian Emperor Haile Selassie put aside Eritrea’s autonomy.<sup>247</sup>

For many years that followed, the Eritrean People’s Liberation Front (EPLF) fought for total independence of Eritreans from Ethiopia.<sup>248</sup> It was not until 1993 after Ethiopia recognised the legitimate claims of Eritreans. The Eritreans were accorded an opportunity to hold a referendum in which 99.8 per cent overwhelmingly voted for independence.<sup>249</sup>

Eventually in 1993, Eritrea was created with the unequivocal consent of the Ethiopian government and approval by the UN, thereby distinguishing it as a model for unilateral

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<sup>243</sup> J Dugard and D Riach ‘*The role of recognition in the law and practice of secession*’ in M Kohen (ed) *Secession: International Law Perspective* (2006) 94.

<sup>244</sup> Crawford op cit note 15 at 402; Dugard op cit note 74 at 105.

<sup>245</sup> Ibid Crawford.

<sup>246</sup> United Nations General Assembly Resolution 390 A (V) (2 December 1950) para 1 and 2.

<sup>247</sup> Kohen op cit note 7 at 4.

<sup>248</sup> Crawford op cit note 15 at 402

<sup>249</sup> Joshua Castellino *International Law and Self-determination* (2000) 171.



secession.<sup>250</sup> With the support of the Transitional Government of Ethiopia, Eritrea was admitted to the UN in 1993.<sup>251</sup> It is concluded that Eritrea's secession was successful in that the parent State consented to its secession rendering this modal, a consensual secession.

#### *b) South Sudan*

A more recent case of secession is that of South Sudan, a territory which was part of Sudan. Until 1962, South Sudan under South Sudan Liberation Movement (SSLM) attempted to secede and gain independence by waging a war against the central government of Sudan.<sup>252</sup> Subsequent to many years of consistent policy of ethnic war in Sudan, South Sudan's attempt to secede at the time did not succeed because the parent State, Sudan and the international community objected to South Sudan's claims for external self-determination.<sup>253</sup>

In 1972, the South Sudanese settled for internal self-determination and became an autonomous territory within the framework of the 1972 Addis Ababa Agreement.<sup>254</sup> However, due to South Sudan's struggle to achieve full independence and owing to suppression of the black Sudanese in the South by Sudanese government, internal conflict ensued up until January 2011 when a peace agreement was made. South Sudan was permitted to hold a referendum in which 98.83 per cent of its people voted to secede from Sudan.<sup>255</sup> A day following its declaration of independence, the central government of Sudan declared its formal recognition of South Sudan's independence.<sup>256</sup> In July 2011, South Sudan was admitted to the UN as a Member State.<sup>257</sup>

<sup>250</sup> General Assembly – Forty Seventh Session South African, GA RES 47/230, 28 May 1993; History Online 'Eritrea becomes a member of the United Nations' 1993, available at <http://www.sahistory.org.za/dated-event/eritrea-becomes-member-united-nations>, accessed on 29 December 2016.

<sup>251</sup> Security Council Resolution 828, 26 May 1993, GA res 4/230, 28 May 1993.

<sup>252</sup> K Rawls 'South Sudan's Independence, Oil and Economic Self-Determination' (2011) Global Comment, available at <http://globalcomment.com/south-sudan-independence-oil-economic-self-determination/>, accessed 20 December 2016.

<sup>253</sup> M Sterio *The Right to Self-Determination under International Law: Selfistans, Secession and the Rule of the Great Powers* (2013) 163.

<sup>254</sup> The Addis Ababa Agreement on the Problem of South Sudan 1972.

<sup>255</sup> Jure Vidmar 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012) 47 *Texas International Law Journal* 541 at 553.

<sup>256</sup> South Sudan counts down to independence', *BBC News* (8 July 2011) available at <http://www.bbc.co.uk/news/world-africa-14077511>, accessed 20 December 2016.

<sup>257</sup> United Nations General Assembly Resolution : UNGA Res 65/308 (14 July 2011) UN Doc A/RES/65/308; The General Assembly admitted the Republic of South Sudan as the 193rd member of the United Nations, welcoming the newly independent country to the community of nations.' See, 'UN Welcomes South Sudan as 193rd Member State', UN News Centre, available at [http://www.un.org/apps/news/story.asp?NewsID=39034#.U7Qbb\\_IdVrM](http://www.un.org/apps/news/story.asp?NewsID=39034#.U7Qbb_IdVrM), accessed 20 December 2016.

In African history, secession of the South Sudanese can be considered as an exceptional case. The international community supported South Sudanese claims to self-determination because they demonstrated capacity to become a nation; as such, should be entitled to sovereignty and recognition as a State.<sup>258</sup>

South Sudan is among the successful States that seceded from the parent State in the context of post-colonial era. The exercise depicts that where the parent State surrenders its claim to territorial integrity, the international community recognises the emergence of a new State.<sup>259</sup> Since the parent State consented to South Sudan's secession, unilateral secession is deemed absent. Sudan relinquished its claim to territorial integrity by legislating a clear mechanism for secession. Where there is consent by a parent State, the legality of this act falls within self-determination and this is rather consensual than unilateral secession.

### c) *Kosovo*

Kosovo was an autonomous territory of the Republic of Serbia, a State which was at the time within Socialist Federal Republic of Yugoslavia (SFRY).<sup>260</sup> The territory had a population of approximately 2 million of whom 90 per cent were Albanian ethnic group.<sup>261</sup> Due to extensive repression from Serbia, Kosovo unilaterally declared independence from its parent State on February 17, 2008.<sup>262</sup>

Despite objections from Serbia, the western States were quick to recognise Kosovo as a State. In the inquiry of *Aaland Islands Commission*, the Jurists argued many factors that besides the majority sentiment of the population, other relevant factors to the question of whether demands for self-determination should in fact lead to the transfer of sovereignty were considered.<sup>263</sup> Similarly, other factors may have been considered in granting recognition to Kosovo's declaration of independence. These may be severe form of discrimination against the Kosovars Albanians and existence of gross human rights violations.

<sup>258</sup> Al-Mizory op cit note 132 at 248.

<sup>259</sup> Vidmar op cit note 255 at 559.

<sup>260</sup> Jure Vidmar 'International legal responses to Kosovo's declaration of Independence' (2009) 42 *Vanderbilt Journal of Transnational Law* 779 at 784- 785.

<sup>261</sup> Bartram S Brown 'Human Rights, Sovereignty, and the Final Status of Kosovo' (2005) 80 *Chicago-Kent Law Review* 235 at 238.

<sup>262</sup> British Broadcasting Corporation 'Kosovo declaration' available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm>, accessed on 28 December 2016; Crawford op cit note 15 at 407.

<sup>263</sup> League of Nations 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question' (1920) 3 *Official Journal* 1 at 6.

Despite resilient protest by Serbs, the United States formally recognised Kosovo as a sovereign and independent new State in 2008.<sup>264</sup> A number of other States such as the United Kingdom, France and Belgium have so far recognised Kosovo as a State.<sup>265</sup> However, countries such as Russia, China, Serbia and Spain which face their own separatist issues have not recognised Kosovo as a State.<sup>266</sup> Russia and Serbia have argued that Resolution 1244 does not allow the secession of Kosovo without the consent of Serbia. In particular, they refer to the resolution's preamble language 'reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia',<sup>267</sup>

In 1999, the UN Security Council created an interim UN administration in Kosovo but the legal status of Kosovo remains that of an autonomous entity under international administration: thus preserving the territorial integrity of Serbia and Montenegro.<sup>268</sup> While 'external self-determination', or secession is disfavoured by legal scholars, the SCC found that 'a right to external self-determination which, in *re secession of Quebec* case potentially takes the form of the assertion of a right to unilateral secession, arises only in the most extreme cases. Even so, it is only under careful defined circumstances that secession may be permitted.'<sup>269</sup>

As noted in Resolution 1244 'a grave humanitarian situation', a threat to international peace and security, the Serbs persistently committed atrocities against Albanians.<sup>270</sup> Against this background, Hilpold argued that it is without doubt that Kosovo qualified for internal and external self-determination or secession from Serbia.<sup>271</sup> It is also argued that in principle; Kosovo's secession from Serbia may be justified based on the given situation of human rights violation of the Kosovars by Serbians. Therefore, Kosovo's declaration of independence and secession should be permitted.

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<sup>264</sup> Bureau of European and Eurasian Affairs Fact Sheet March 17, 2016 'US Affairs with Kosovo' (2016) available at <https://www.state.gov/r/pa/ei/bgn/100931.htm>, accessed 28 December 2016.

<sup>265</sup> Ibid.

<sup>266</sup> Vidmar op cit note 255 at 802.

<sup>267</sup> Preamble to SC Res 1244 'Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia'; annex 2, para 8.

<sup>268</sup> Ibid.

<sup>269</sup> *Reference re Secession of Quebec* supra note 182 para 126. 'Such cases are those of colonial peoples and also 'where a people are subjected to serious human rights violation. For the Court these different criteria were inapplicable in the case of *re Quebec*.

<sup>270</sup> Christopher J Borgen 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (2008) 12 *ASIL* 1 at 11; See also UNSC Res 1244 (10 June 1999) UN Doc 1244/1999.

<sup>271</sup> Peter Hilpold 'The Kosovo case and international law: Looking for applicable theories' (2009) 8 *Chinese Journal of International Law* 47 at 54.

However, despite Kosovo's recognition by a number of existing States and the establishment of diplomatic relations with other States in the international community, Kosovo is not a member of the United Nations.<sup>272</sup> As Vidmar argued, its success in the UN Charter era is implausible and depends on the legality and legitimacy of such a mode of State creation and international recognitions.<sup>273</sup> In accordance with international law, its external self-determination and unilateral secession remain unsuccessful.

#### *d) Biafra*

In 1967, the Ibos of Nigeria were subjected to massacre and systematic riot. Following a series of oppression, injustice and complex political disorders that led to the killing of many civilians, the people of Biafra attempted to secede from the Federation of Nigeria and established the Republic of Biafra.<sup>274</sup>

On May 30, 1967, Biafra unilaterally declared its independence from the Eastern region of Nigeria. Okoronkwo argued that the human rights denial of and the unclear developmental prospects for the people of Biafra compelled them to secede.<sup>275</sup> It can be further argued that the mass violation of human rights provided a justification for the people of Biafra to exercise their rights of self-determination.

Generally, Biafra's attempted secession received less external support. Only five States - Zambia, Tanzania, Ivory Coasts, Gabon and Haiti recognised Biafra though none of these States established diplomatic relations with Biafra.<sup>276</sup> The rest of existing States found that Biafra did not qualify to be recognised as a State.<sup>277</sup> However, the central government was strongly supported by the OAU but there was no involvement of the UN.<sup>278</sup>

Biafra's attempt at unilateral secession is concluded as unsuccessful and at no point was it recognised as a State by a considerable number of existing States.

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<sup>272</sup> Bureau of European and Eurasian Affairs Fact Sheet March 17, 2016 'US Affairs with Kosovo' (2016), available at <https://www.state.gov/r/pa/ei/bgn/100931.htm>, accessed 28 December 2016.

<sup>273</sup> Vidmar op cit note 255 at 849.

<sup>274</sup> Crawford op cit note 15 at 406; Pius L Okoronkwo 'Self-Determination and the Legality of Biafra's Secession under International Law' (2002) 25 *Loy L.A International & Comparative Law Review* 63 at 63.

<sup>275</sup> Ibid Okoronkwo at 63.

<sup>276</sup> Woodrow Wilson 'Secession: State practice and international law after the dissolution of the Soviet Union and Yugoslavia' (1993) 3 *Duke Journal of Comparative & International Law* 299 at 307.

<sup>277</sup> Ibid at 309.

<sup>278</sup> Crawford op cit note 15 at 406.

e) *Katanga*

The Democratic Republic of the Congo (DRC) - formerly known as Zaire was colonised by Belgium and became independent on 30 June 1960.<sup>279</sup> Eleven days later, with considerable external support, Katanga's DRC rich mineral province declared its independence.<sup>280</sup> Due to significant external support, Katanga Government was considerably more stable than the central government of the DRC at the time.<sup>281</sup> However, in January 1963, with the assistance of UN forces, Katanga province's attempt to secede was crushed.<sup>282</sup> In the *Katangese Peoples' Congress v Zaire*, the African Commission on Human and Peoples' Rights (ACHPR) held that,

‘the right of Katangese to secede from Zaire (Democratic Republic of the Congo) ... any right to self-determination possessed by the Katangese must be exercised in conformity with the principles of sovereignty and territorial integrity’.<sup>283</sup>

Several other reasons for the international community's opposition of Katanga secession existed. During the early phases of the secession effort, there were concerns by the international community that the declared State regime did not represent the wishes of the majority of the Katanga population.<sup>284</sup> Additionally, there were also concerns that the DRC could not survive without Katanga, the most viable, populated and economic province of DRC. Moreover, the secession was mainly supported by Belgium and other Western States who were after protecting their business interests in Katanga.<sup>285</sup>

In spite of its claim to self-determination and stability, Katanga was not recognised by any State in the international community.<sup>286</sup> The ACHPR ruled on Katanga's secession by invoking the principle of territorial integrity,<sup>287</sup> guaranteeing respect for existing boundaries proclaimed in Resolution 1524 (XV).<sup>288</sup> In historical context, the United Nations' eventual disapproval of the Katanga secession is significant. It established a precedent for the international community's abandonment of a neutral stance toward a secessionist movement

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<sup>279</sup> Crawford op cit note 15 at 404

<sup>280</sup> Ibid.

<sup>281</sup> Ibid.

<sup>282</sup> Solomon E Salako *Civil Wars and the Right to Self-Determination* (2013) 132; S/RES/169 (1961)

<sup>283</sup> *Katangese Peoples' Congress v Zaire* (1996) 75 (92) para 26-28.

<sup>284</sup> Wilson op cit note 276 at 306.

<sup>285</sup> Catherine Hoskyns ‘The Congo since independence, January 1960 to December 1961’ (1966) 4 *The Journal of Modern African Studies* 111 at 149

<sup>286</sup> Crawford op cit note 15 at 405.

<sup>287</sup> *Katangese Peoples' Congress v Zaire* (1996) Case No. 75/92, 8th Annual Activity Report 1994 - 1995 (ACHPR/RP/8th).

<sup>288</sup> Dugard op cit note 74 at 102.

before political and military frustration. Katanga's attempt at unilateral secession was unsuccessful.

*f) Chechnya*

Chechnya was an autonomous territory within the Russian Soviet Federated Socialist Republic. However, in November 1991, Chechnya unilaterally declared its independence from the Russian Federation, the USSR and Ingushetia. Although viewed as illegal by Moscow, presidential elections were held in the newly declared republic in which Dzhokhar Dudayev was declared a winner of the elections.<sup>289</sup> Chechnya was left to its own strategies and it maintained effective control of its own government.<sup>290</sup>

In 1994, the Russian army attempted to suppress the desires of secessionists through its disproportionate force, serious violation of humanitarian law against secessionists.<sup>291</sup> Nonetheless, these acts turned unsuccessful and the struggle which resulted in the killing of many civilians continued. The conflict in Chechnya remained classified as an internal armed conflict and that the principle of territorial integrity applied.<sup>292</sup> The British and USA governments also underscored the significance of respect for territorial integrity. Other than calling for minimum and respect for human rights, Britain the USA only denounced the use of force by Russia against Chechnya.<sup>293</sup>

Admittedly, Chechnya's claim to independence has been rendered illegitimate because of the actions of its government's inability to establish any viable State institutions, a situation which appeared unacceptable before the international community. In addition, Russia's right to defend its territorial integrity was strongly supported by the French, British and US governments.<sup>294</sup>

Despite substantial evidence that the Chechen people were subjects of grave human rights violations perpetrated by Russian forces during the period 1994 and 1999, recognition of Chechnya by the international community never came through. Crawford argued that,

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<sup>289</sup> Morton H Halpern et al *Self-determination in the new world order* (1992) 154.

<sup>290</sup> Crawford op cit note 15 at 408.

<sup>291</sup> TN Tappe 'Chechnya and the State of self-determination in a breakaway region of the Former Soviet Union: Evaluating the legitimacy of secessionist claims' (1995) 34 *Columbia Journal of Transnational Law* 255 at 282 at 276.

<sup>292</sup> Crawford op cit note 15 at 409.

<sup>293</sup> Ibid <sup>293</sup> Crawford op cit note 15 at 409; Great Britain Statement in 1995 66 BY 621; United States Statement in 1995 6 US Department of State Dispatch 119 – 120.

<sup>294</sup> Crawford op cit note 15 at 409 – 410; Tappe op cit note 291 at 282.

‘ ... even though other States qualified the Chechens as a ‘people’ and that even though these people were subject to violation of human rights and humanitarian law on a large scale, the principle of territorial integrity has been respected and reaffirmed.’<sup>295</sup>

However, stringent application of remedial secession theory avoids approving Chechnya’s secession because under remedial secession, Chechnya would still be required to negotiate with Russia for secession.<sup>296</sup> Due to its lack of recognition, Chechnya’s unilateral declaration of independence from the Soviet Union in 1991 offers clear evidence that there is no identifiable precedent for secession.<sup>297</sup> Chechnya remains an integral territory, a province of the Russian Federation. Therefore, Chechnya’s attempt at secession is unsuccessful and the principle of territorial integrity has been upheld.

#### IV. CONCLUSION

Drawn from this chapter, it has been found that secession is generally a mere fact. While the principle of self-determination has been found to be recognised as a norm of international law, unilateral secession has not. It has been established that secession is one of the modes of State creation and is also intertwined with self-determination.

Depending on the available facts, international law neither prohibits unilateral secession nor explicitly recognise such a right but does provide a framework within which certain secessions are preferred, for example, where there are serious human rights violation or where serious discrimination of a particular minority group is perpetrated. State practice also demonstrates that under certain conditions, international law recognises secession and becomes a legitimise mode of exercising the right to self-determination. For example, where extreme human rights violations have been found to exist.<sup>298</sup>

It has been argued that attempts at unilateral secession without the consent of a parent-State from which the entity is seceding is illegitimate. This is usually because territorial integrity of a State takes precedent over a right to self-determination of that State’s national minorities.

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<sup>295</sup> Crawford op cit note 15 at 410

<sup>296</sup> Lalos op cit note 99 at 811.

<sup>297</sup> David Raič, *Statehood and the Law of Self-Determination* (2002) 373.

<sup>298</sup> Ibid.

From international law perspective, secession is not illegal nor is suppression of such attempts by the government is. While secession has in some instances been denied, remedial secession has been allowed in some exceptional circumstances.

Although there is substantial support among legal scholars for a concept such as ‘remedial secession’ where a right to secede when grave human rights violation is accepted, this concept has not yet developed in contemporary international law.<sup>299</sup> International law might deliberately remain neutral or silent in some issues. In the wording of the SCC’s judgement, it is evident that international law neither contain a right of unilateral secession nor an explicit denial of such a right.<sup>300</sup> This could be explained that the international community endeavours to maintain stability where the internal self-determination of a minority is utterly hindered. The international community has expressed concern that secession would open the door for numerous minority regions to claim independence.<sup>301</sup>

As earlier mentioned, under certain circumstances, the right to unilateral secession could be justifiable if the people in question have been subjected to serious violation of their fundamental human rights or denied the right of internal self-determination. For example, in post-colonial era, Bangladesh (1971) Eritrea (1993) and South Sudan (2011) have successfully seceded and claimed independence from a formerly recognised sovereign State. These are instances of consensual session.

Katanga, Chechnya, Kosovo, Biafra, etcetera have been unsuccessful. In the first two examples of Eritrea and South Sudan, these have been successful at secession because the parents States from which they seceded consented and this act is distinct from unilateral secession. The other examples are failed attempts at secession as their nature is of unilateral secession. In these cases, the principle of territorial integrity took precedence over secession. Among legal scholars, solid circumstances under which secession maybe legitimised are still glare. Without concrete position, one is left to wonder as to what degree of uniqueness must be deemed to exist before a right to secede is recognised.

In this chapter, it has also been argued that outside colonial context, State practice is reluctant to recognise unilateral secession and so far, there is no State created through unilateral secession and without the consent of the parent State that has become a UN Member State. The next chapter assesses Somaliland’s secession and its claim for statehood.

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<sup>299</sup> Peter Hilpold ‘The Kosovo case and international law: Looking for applicable theories’ (2009) 8 *Chinese Journal of International Law* 47 at 56.

<sup>300</sup> *Reference re Secession of Quebec* supra note 182 para 112.

<sup>301</sup> *Lalos* op cit note 99 at 811.



## CHAPTER IV: THE CASE OF SOMALILAND IN INTERNATIONAL LAW

### I. INTRODUCTION

For Somaliland's claim of statehood to be successful, it must prove that it satisfies the traditional criteria of statehood established under international law, that of a defined territory; a permanent population; a government; and the capacity to enter into relations with other States. In any case, the nexus between the factual and legal criteria of statehood is crucial.

Certainly, questions about the nature of statehood and how it is achieved in international law are usually raised. As we shall see in this chapter, the four criteria appears not to be difficult to fulfil in the case of Somaliland but the absence of recognition preclude the Republic of Somaliland from becoming a State accepted as a subject of international law. Somaliland's claim to statehood will be analysed against the theories of statehood in international law – the declaratory and constitutive theories.

When an entity within a State secedes by claiming a right of self-determination and declares itself independent from the parent State, the parent State may lawfully respond by preventing the loss of its territory to the seceding entity.<sup>302</sup> An example is our case study, Somaliland where the Republic of Somalia has not consented to Somaliland's secession. Since Somaliland's declaration as a State in 1991, it has not been recognised by any State but has only endured as an autonomous province of the Republic of Somalia.<sup>303</sup> Somaliland's withdraw from the union with the Republic of Somalia seemed to have had no bearing of breaching international law.

However, this kind of an act has been the substance of debate as to whether international law supports declaration of new independent entities created through secession without the consent of the parent State or recognition of the new States by existing States is now a rule of customary law.<sup>304</sup> While some authors argue that the violation of fundamental norms of international law such as creation of States through use of force may preclude an entity from qualifying as a State,<sup>305</sup> others argue that the right to territorial integrity of an existing State undermine claims to a right of secession particularly in post-colonisation era.<sup>306</sup>

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<sup>302</sup> Ibid.

<sup>303</sup> Hoyle op cit note 11 at 88.

<sup>304</sup> Kohen op cit note 7 at 3.

<sup>305</sup> John Dugard *Recognition and the United Nations* (1987) 135.

<sup>306</sup> Tappe op cit note 291 at 255.

Although there has been a few support for and implied recognition of Somaliland's secession into a new State, other States have declared that Somaliland's secession is contrary to international law and a violation of the Republic of Somalia's sovereignty and territorial integrity.<sup>307</sup> But traditionally, international law remains legally neutral to secession.<sup>308</sup>

It is argued that a clear position of international law on secession is contained in the statement made by the *Commission of Jurists* appointed by the League of Nations to examine the *Aaland Islands* dispute. The Commission stated that 'Positive international law does not recognise the right of national groups as such, to separate themselves from the State of which they form a part by the simple expression of a wish....'<sup>309</sup> The Commission's statement is flawless on secession in international law in that it views secession as a threat to sovereign rights of a State and a danger to the international community's interests. This view is legitimate in international law because it is supported by State practice. It renders secession illegitimate when consent from the parent State is absent.

Significant to note in the case study of Somaliland is that the continued civil conflicts prevailing in Somalia, a United Nations Member State where Somaliland lies has attracted attention of the international community and the UN at large. This is in an effort to bring peace and stability to Somalia.

#### a) *Historical background of the Republic of Somaliland*

Located in the north-western part of the Horn of Africa, the Republic of Somaliland, borders Ethiopia, Djibouti, the Gulf of Eden and the Indian Ocean.<sup>310</sup> Formerly a British Protectorate (British Somaliland), Somaliland became an independent State from the British rule on 26 June 1960.<sup>311</sup> A day later, the Republic of Somaliland's neighbouring Italian Protectorate which was known as Trust Territory of Italian Somaliland (Somalia in modern days), also became independent from Italian rule.<sup>312</sup>

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<sup>307</sup> The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (24 October 1970) 121, annex, principle 5 (7); Jure Vidmar op cit note 196 at 154.

<sup>308</sup> Crawford op cit note 15 at 390.

<sup>309</sup> *Reference re Secession of Quebec* supra note 182; League of Nations Official Journal 'Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question' (1920) 3.

<sup>310</sup> Joakim Gundel 'Clans in Somalia' Austrian Centre for Country of Origin & Asylum Research and Documentation 2009, available at <http://www.riteskreuz.at/accord>, accessed 20 June 2016.

<sup>311</sup> Crawford op cit note 15 at 412.

<sup>312</sup> Ibid.

On July 1, 1960 British Somaliland (Somaliland) merged with Trust Territory of Italian Somaliland (Somalia) under an Act of Union and formed in Modern days, Republic of Somalia.<sup>313</sup> However, the 1960 union of the two new States was marred with differences resulting from different inherited colonial customs.<sup>314</sup> Two separate legal systems and two different 'official' languages of governments existed.<sup>315</sup> The Somali Republic in the north enforced the English common law and the Indian Penal Code while the southerners enforced the Italian code.<sup>316</sup>

In addition, redistribution of economic and natural resources became problematic as infrastructure lacked in the northern part of the country.<sup>317</sup> Since the Act of Union document (the Act) was prepared by members from the north, members of the south argued that the terms contained in the Act was imposed on them. On the other hand members of the northern region were aggrieved on ground that they were side-lined in the process of union.<sup>318</sup>

As opposed to the Act which required a unitary and centralised State government, the Somalis in the south dominated the political and economic activities of the State to which those in the north were against as they preferred a federal system of government.<sup>319</sup> Under the leadership of Said Barre who assumed power in 1969, differences between the two regions of the country resulted in continued tensions.

From 1977 to 1978, Somalia was ravaged by war against Ethiopia over the Ogaden region.<sup>320</sup> During the war, many people were killed, hundreds and thousands of civilians fled Somalia to neighbouring Ethiopia, Djibouti, Sudan and Kenya while others were internally displaced.<sup>321</sup> The war deteriorated the union between the north and southern regions of Somalia. However, even after the war, Somalia continued to experience instability as civil war broke out in different parts of the country.<sup>322</sup>

The emergence refugee crisis and internally displaced persons of the 1977 to 1978 war aftermath triggered confiscation of land belonging to members of Isaaq majority ethnic

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<sup>313</sup> Alexis Arieff 'De Facto Statehood? The Strange Case of Somaliland' 2008 *Yale Journal of International Affairs* 60 at 65.

<sup>314</sup> Crawford op cit note 15 at 413.

<sup>315</sup> Michael Wall 'State Formation in Somaliland: Bringing Deliberation to Institutionalism (PhD thesis 2011 Development Planning Unit UCL) 112.

<sup>316</sup> Crawford op cit note 15 at 413.

<sup>317</sup> Ibid.

<sup>318</sup> Michael Wall 'State Formation in Somaliland: Bringing Deliberation to Institutionalism (2011) Thesis at 112

<sup>319</sup> Arieff op cit note 313 at 68.

<sup>320</sup> Crawford op cit note 15 at 414.

<sup>321</sup> Permanent Mission of the Somali Republic to the United Nations 'Somalia Brief background' available at <https://www.un.int/somalia/somalia/country-facts>, accessed on 28 June 2016.

<sup>322</sup> Permanent Mission of the Somali Republic to the United Nations 'Somalia Brief background' available at <https://www.un.int/somalia/somalia/country-facts>, accessed on 28 June 2016.

group (the primary clan family in Somaliland) in the northern part of Somalia.<sup>323</sup> In 1982, the civil war ensued and left approximately 50,000 civilians - mainly of Isaaq clan killed.<sup>324</sup>

President Siad Barre who held leadership since 1968 autocratically ruled the Somali Republic until 1991.<sup>325</sup> His regime was characterised by discrimination against the Isaaq majority ethnic group in the northern region where there was resistance; as a result, the northern region of Somali Republic formed the Somali National Movement (SNM) whose predominant members were Isaaq majority clans. The SNM's primary objective was to oust the Somali Government led by President Mohammed Siad Barre.<sup>326</sup>

In approximately 1990, Siad Barre's regime lost control over most of the parts in the northern regions. In January 1991, President Siad Barre fled Mogadishu, the capital city of Somalia.<sup>327</sup> Following the president's absence, the central government of Somalia collapsed and the SNM established territorial control over the borders in the northern regions, the former British Somaliland.<sup>328</sup>

On 17 May 1991, British Somaliland communities which comprised of leaders of Somali National Movement (SNM) and clan elders of northern Somalia convened at a Grand Conference in Burao and declared the territory of Somaliland as a sovereign and independent State.<sup>329</sup> At the conference, the union with Somalia was revoked; the sovereignty and independence of Somaliland was declared and a Provisional Constitution of Somaliland was adopted.<sup>330</sup> The Republic of Somaliland's territory was based on the borders of the former British Somaliland Protectorate.

Following the disintegration of Somali Government, Somaliland was not the only region that declared independence. Other territorial entities such as Puntland in the north-eastern region declared independence in 1998. Puntland aimed at participating in any Somali resolution to form a new central government;<sup>331</sup> Jubaland seceded in 1998 with the declaration of the entity as Jubaland - the territory of which is now known as South Western

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<sup>323</sup> Crawford op cit note 15 at 413.

<sup>324</sup> Ibid.

<sup>325</sup> Arieff op cit note 313 at 65

<sup>326</sup> Crawford op cit note 15 at 413

<sup>327</sup> Arieff op cit note 313 at 65

<sup>328</sup> Ibid at 66

<sup>329</sup> Hoyle op cit note 11 at 81; Harris op cit note 2 at 101.

<sup>330</sup> Crawford op cit note 15 at 413.

<sup>331</sup> Permanent Mission of the Somali Republic to the United Nations 'Somalia Brief background' available at <https://www.un.int/somalia/somalia/country-facts>, accessed on 28 June 2016.

Somalia with its status uncertain;<sup>332</sup> Benadirland and Hiranland also declared independence in the same year.<sup>333</sup>

In contrast to Somaliland, disputes over the territory inside Somaliland inhabited by clans that belong to the same family such as the Majerteen arose in other territories such as Puntland. This is due to the fact that Puntland has a much clan-based administration.<sup>334</sup> As with Somaliland, the territory has experienced a relatively stable atmosphere within its claimed borders – the former colonial boundaries.<sup>335</sup> The last known clan conflicts within Somaliland were in 1997; as a result, a large number of its population fled to neighbouring countries such as Ethiopia, Kenya and Djibouti.<sup>336</sup> Additionally, there have been operational and governmental institutions as well as a hybrid democratic political system.<sup>337</sup> Somaliland held a referendum and on May 31, 2001, a Constitution was adopted of which Article 1 provides:-

“The country which gained its independence from the United Kingdom of Great Britain and Northern Ireland on 26th June 1960 and was known as the Somaliland Protectorate ... shall hereby and in accordance with this Constitution become a sovereign and independent country known as ‘The Republic of Somaliland.’”<sup>338</sup>

The Republic of Somaliland’s law-making body is composed of the House of Elders and House of Representatives.<sup>339</sup> Somaliland has held democratic presidential, parliamentary and local district elections; and has a three-party political system.<sup>340</sup> Although these structures exist, they do not effectively function to a satisfactory level. The institutions do not ensure effective protection of civilian within its claimed territorial borders.<sup>341</sup>

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<sup>332</sup> Permanent Mission of the Somali Republic to the United Nations ‘Somalia Brief background’ available at <https://www.un.int/somalia/somalia/country-facts>, accessed on 28 June 2016.

<sup>333</sup> Permanent Mission of the Somali Republic to the United Nations ‘Somalia Brief background’ available at <https://www.un.int/somalia/somalia/country-facts>, accessed on 28 June 2016.

<sup>334</sup> Joakim Gundel ‘Clans in Somalia’ Austrian Centre for Country of Origin & Asylum Research and Documentation 2009, available at <http://www.rotekreuz.at/accord>, accessed 20 June 2016.

<sup>335</sup> Ibid.

<sup>336</sup> *Lalos* op cit note 99 at 794.

<sup>337</sup> Joakim Gundel ‘Clans in Somalia’ Austrian Centre for Country of Origin & Asylum Research and Documentation 2009, available at <http://www.rotekreuz.at/accord>, accessed 20 June 2016.

<sup>338</sup> Constitution of Somaliland available at [http://www.somalilandlaw.com/Somaliland Constitution](http://www.somalilandlaw.com/Somaliland%20Constitution), accessed on 28 June 2016.

<sup>339</sup> Joakim Gundel ‘Clans in Somalia’ Austrian Centre for Country of Origin & Asylum Research and Documentation 2009, available at <http://www.rotekreuz.at/accord>, accessed 20 June 2016.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

## II. THE REPUBLIC OF SOMALILAND UNDER THE CLASSICAL CRITERIA OF STATEHOOD

Established on Article 1 of the Montevideo Convention, the declaratory theory is a well-known founding criterion for statehood in international law.<sup>342</sup> In *S v Banda*, Friedman J said that, ‘The declaratory theory is objective, and considers the requisites of statehood and sovereignty on well-established criteria of international law.’<sup>343</sup> That is a State has sovereignty if it possesses the Montevideo Convention qualifications.<sup>344</sup> In the below section, Somaliland’s statehood will be examined against the traditional criteria of statehood and its effectiveness will be evaluated. It will also be considered against other statehood criterion which contradict or complements the Montevideo principle.

### *a) Permanent population*

A State is composed of not only a territory but also a discrete group of individuals.<sup>345</sup> As of 2009, Somaliland’s population was estimated at 3.8 million Sunni Muslims; 55 per cent of who are nomads while 45 per cent live in rural and urban areas.<sup>346</sup> Although half of its population are nomads, Somaliland meets the permanent population requirement under international law. For an entity to qualify as a State the doctrine of international legal system does not necessarily require a minimum and fixed number of the inhabitants. Permanent population as a criterion is therefore assumed not fixed.<sup>347</sup>

Somaliland’s permanent population has continued to increase following organised reparation exercise undertaken and currently being carried out by the office of the United Nations High Commission for Refugees (UNHCR).<sup>348</sup> The author concludes that Somaliland meets the criterion of permanent population.

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<sup>342</sup> Crawford op cit note 15 at 46.

<sup>343</sup> *S v Banda* supra note 34 at 538 G-F

<sup>344</sup> Ibid at 538.

<sup>345</sup> Dixon op cit note 8 at 115.

<sup>346</sup> Ministry of National Planning and Development Somaliland in Figures, available at [http://www.somalilandlaw.com/Somaliland\\_in\\_Figures\\_2010.pdf](http://www.somalilandlaw.com/Somaliland_in_Figures_2010.pdf), accessed on 21 June 2016.

<sup>347</sup> Dixon & McCorquodale op cit note 36 at 136.

<sup>348</sup> Ron Redmond Ethiopia: repatriation of Somalis resumes, available at <http://www.unhcr.org/news/briefing/2001/7/3b61544416/ethiopia-repatriation-somalis-resumes.html>, accessed on 13 July 2016.

*b) Defined territory*

Somaliland lies in the north-western part of Somalia. Since 1885 when Britain secured Somaliland as a protectorate territory, the border demarcations were made between Ethiopia, Djibouti (French Somaliland), Somaliland (British Somaliland), Somalia (Italian Somaliland) and Kenya.<sup>349</sup>

Somaliland's colonial borders have remained intact. However, Somalia's objection to Somaliland's secession is based on the fact that subsequent to the five days of independence in 1961, Somaliland willingly merged with Somalia and therefore, the reflecting former colonial borders demarcated by British treaties with Ethiopia, Italy, and France were altered at the time of union.<sup>350</sup>

Somaliland's frontiers between its neighbouring entities such as Puntland are clearly defined and have existed since the time inherited from the British colony but its borders with Puntland are still disputed. However, the dispute does not affect Somaliland's existence because existence of a State is independent of boundary delimitation.<sup>351</sup>

The legal mechanisms test which the ICJ adopted in resolving international border disputes is the doctrine of *uti possidetis*.<sup>352</sup> This principle is based on the idea that the frontiers of newly independent States should follow the frontiers of the old colonial territories from which they emerged and that they cannot be easily altered by unilateral action.<sup>353</sup> It therefore prevents the moving of colonial boundaries. The secession of Eritrea from Ethiopia in 1993 took place without violating the principle of *uti possidetis*. Based on this principle, Somaliland satisfies the statehood criterion of a defined territory which has been maintained since colonial era.

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<sup>349</sup> Brad Poore 'Somaliland: Shackled to the Failed State' (2009) 45 *Stanford Journal of International Law* 117 at 123.

<sup>350</sup> Ibid.

<sup>351</sup> Crawford op cit note 15 at 49.

<sup>352</sup> Lalos op cit note 99 at 794.

<sup>353</sup> Dixon op cit note 8 at 173.

c) *Government*

In order to occupy a position of a State in international law, Somaliland must have a practical identity of a government whose core responsibilities are the international rights and duties of a State, self-governing or independent of any other power.<sup>354</sup>

Somaliland has an established government which is functional and effective – controlling most of the territory on which it lays claim.<sup>355</sup> Although not a prerequisite for recognition as an independent State, an indication of a coherent political structure must exist to form executive and legislative organs.<sup>356</sup>

In May 2001, Somaliland adopted a Constitution with an objective of a multi-party and democratic system of government.<sup>357</sup> Somaliland has an elected president and a legislative parliament.<sup>358</sup> Between the three arms of government, Somaliland's Constitution institutes a separation of power and promotes the existence of opposition political parties, free media and fundamental human rights and freedoms.<sup>359</sup> The recent parliamentary and local elections were held in 2005 and 2012 respectively while Presidential elections took place in 2010. In all these elections, the international and local observers have stated that the elections were free and fair.<sup>360</sup>

Effective and functional government does not mean that an established State loses its statehood once effectiveness of the government ceases.<sup>361</sup> Law, order and stability in a certain space of the globe and among a permanent population are of the overriding evidence to satisfy the criterion of government. In 1992, the European Community (EC) recognised Croatia and Bosnia- Herzegovina and were admitted to UN membership at the time when there was no effective governments in these two States and the territories were substantially controlled by non-governmental forces.<sup>362</sup>

In Somaliland's case, the relevant factor to consider under international law could be the extent to which the area not under the control of the government of Somalia is claimed as

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<sup>354</sup> *S v Banda* supra note 48 at 540 G-F

<sup>355</sup> Ilias Bantekas 'Failed States in the Muslim world: A constitutional and international relations perspective' (2011) 7 *Journal of Islamic State Practices in International Law* 1 at 14.

<sup>356</sup> Shaw op cit note 81 at 200.

<sup>357</sup> Bantekas op cit note 355 at 14.

<sup>358</sup> Arieff op cit note 313 at 66

<sup>359</sup> The recognition of Somaliland: A brief history, available at <http://recognition.somalilandgov.com/history/>, accessed on 20 June 2016.

<sup>360</sup> Ibid.

<sup>361</sup> Dixon op cit note 8 at 117.

<sup>362</sup> Shaw op cit note 81 at 2001.



separate from *de facto* control.<sup>363</sup> Arieff argued that notwithstanding some democratic failings, Somaliland has its own independent legal system and hosts a substantial number of refugees from southern Somalia. Somaliland's government commands a liveried military and police force,<sup>364</sup> has a stable government which controls the territory and population it lays claim on.<sup>365</sup>

However, although Somaliland has governmental structures, there is ineffective functioning of these structures to satisfactorily ensure effective protection of civilian within its claimed territorial borders.<sup>366</sup> But failure in the established governmental structures does not obviate Somaliland from meeting the statehood criterion of government because some States have ineffective governments and yet their statehood remains unaffected.

More arguably, the EU has commended Somaliland's contribution to peace making, good governance, democratic and stability in the Horn of Africa.<sup>367</sup> As evidenced in the new emerged States of Bosnia-Herzegovina and Croatia, the norms of contemporary international law with regard to new States suggests reforms to the criterion of effective control of government in the territory claimed by an entity.<sup>368</sup> Furthermore, Somaliland has its own executive and other legal structures through which it conducts its external relations, a sincerely democratic government and established legal systems in particular, a Constitution and nationality laws.<sup>369</sup> This is evidence of statehood.

On the basis of its autonomy, isolation and separation made up of its permanent population and territory, Somaliland meets the traditional and legal statehood criterion of organised and effective government.<sup>370</sup> Although the above mentioned structures exist, Somaliland is not legally independent of Somalia. Somaliland's government is represented by the government of Somalia at international level. But this does not disqualify Somaliland from meeting the criterion of government.

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<sup>363</sup> Shaw op cit note 81 at 200. See Yugoslavia Arbitration Commission's Opinion. According to the laid down laid down in the Draft Convention on Yugoslavia and the EC Guidelines on the Recognition of New State in Eastern Europe, Croatia had not met the requirement

<sup>364</sup> Arieff op cit note 313 at 67.

<sup>365</sup> Harris op cit note 2 at 101.

<sup>366</sup> Joakim Gundel 'Clans in Somalia' Austrian Centre for Country of Origin & Asylum Research and Documentation 2009, available at <http://www.riteskreuz.at/accord>, accessed 20 June 2016.

<sup>367</sup> Andris Piebalgs, EU Commissioner for Development (2011).

<sup>368</sup> Shaw op cit note 81 at 2001.

<sup>369</sup> Brownlie op cit note 60 at 72.

<sup>370</sup> Dixon & McCorquodale op cit note 36 at 137.

d) *Capacity to enter into relationship with other States*

A mere declaration of independence does not qualify an entity to possess capacity to enter into relations with other States. This is because existing States on the international plane should recognise the entity as a new State.<sup>371</sup> In an effort to gain recognition in the international community, Somaliland has substantially entered into relations with international bodies and other States in the region.<sup>372</sup> Somaliland runs its own internal affairs in a state-like manner. It has its own currency and issues travel documents to its claimed permanent population.<sup>373</sup> Somaliland has also made external relations with other existing States such as Ethiopia. In the *Island of Palmas* case of arbitration, Judge Huber stated that;

‘Sovereignty in the relations between States signifies independence. ... State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.’<sup>374</sup>

Dugard argued that, an entity which is subject to the authority of another State in controlling its external affairs cannot be regarded to have met the criterion and cannot be defined as an independent State.<sup>375</sup> In 1910, South Africa had no capacity to enter into treaties with other States without the support of Britain;<sup>376</sup> as such, she was not entitled to be considered as an independent State for she did not possess the right to enter into relations with other States. It was until after World War I when it became free from Britain that South Africa enjoyed the ‘capacity to enter into relations with other States’.<sup>377</sup>

The government of Somaliland has entered into a collection of relations with existing States as well as intergovernmental organisations with which, it has agreements such as those on monitoring of elections, relief and trade, security and counter-terrorism, and immigration.<sup>378</sup> Somaliland has bilateral and multilateral relations with the UN and its numerous agencies such as the Arab League, EU and the USA.<sup>379</sup> As evidenced in the UN’s acceptance of Somaliland’s rejection of the presence of UN peacekeepers on its territory,

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<sup>371</sup> Dugard op cit note 74 at 85

<sup>372</sup> Arieff op cit note 313 at 60.

<sup>373</sup> Somalia Country Specific Information, Travel State.Gov, available at [http://travel.state.gov/travel/cis/patw/cis/cis\\_1023.html](http://travel.state.gov/travel/cis/patw/cis/cis_1023.html), accessed on 29 June 2016.

<sup>374</sup> *Island of Palmas* supra note 67 at 838.

<sup>375</sup> Dugard op cit note 74 at 85.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Arieff op cit note 313 at 62

<sup>379</sup> Arieff op cit note 313 at 69.

agencies of the UN have tacitly accepted Somaliland's distinctive status in international law.<sup>380</sup>

The United Kingdom (UK) regards Somaliland as an independent State. The UK holds its external affairs with Somaliland through its embassy in Addis Ababa.<sup>381</sup> The UK authority endeavours to support Somaliland's international efforts to develop a diplomatic and viable consensus with Somalia and reach an agreeable solution with regard to their impending relationship.<sup>382</sup> In 2013, Somaliland's President held a meeting with the European Union Envoy to Somaliland and Somalia. The meeting was followed by Minister of Foreign Affairs and International Co-operation's joint press conference in Hargeisa, the capital city of Somaliland.<sup>383</sup> It is argued here that although there exists these relationships, they do not necessary constitute recognition of statehood.

However, Somaliland's relations with the USA are certainly multifaceted due to the tortured history of American policy in the Horn of Africa and the post-2001 Global War on Terror. Initially, the USA was particularly unwilling to recognise the self-declared autonomous entity in Somalia (which included Somaliland) for fear of fuelling instability in the region.<sup>384</sup> But in 2005, the USA government's financial aid to monitor Somaliland's 2005 parliamentary elections channelled through International Republic Institute is evidence that the US has changed its stance toward her relations with Somaliland.<sup>385</sup> Somaliland's diplomatic representative who is resident in Washington DC is in regular negotiations with American counterparts on different issues.<sup>386</sup>

In the African region, Somaliland's relation with existing States is complicated. Ethiopia is the only State that appears to have established relatively strong relations with Somaliland. In 2005, Ethiopia and Somaliland made an agreement which permits Ethiopia to use Somaliland's Berbera Port for international trade.<sup>387</sup> Conversely, Eritrea, who is an enemy to Ethiopia, does not support Somaliland's claims of statehood but backs calls for a unified Somalia.

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<sup>380</sup> Ibid.

<sup>381</sup> Arieff op cit note 313 at 69.

<sup>382</sup> Ibid.

<sup>383</sup> Recognition of Somaliland – claiming our rightful place within the community of nations, available at <http://recognition.somalilandgov.com/joint-press-conference-with-the-european-union-envoy-to-somaliland-and-somalia/>

<sup>384</sup> Arieff op cit note 313 at 72.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

Furthermore, most Arab States - Egypt in particular, aspires to reconstruct Somalia into a regional counterweight to Ethiopia. Egypt called upon Somali leaders to advance a national authority and occupy its place in the international community and the Arab family.<sup>388</sup> To that effect, the Egyptian government has strategically blocked recognition of Somaliland in the Arab League.<sup>389</sup> This is as a result of the major source of foreign exchange within the Arab League Gulf States sourced from remittances by Issaqs, the majority clan members of Somaliland working in the Gulf of Aden.<sup>390</sup> Kenya and Djibouti have maintained a neutral stance in their relations with Somaliland though Djibouti has gone further to make trade agreements with Somaliland.<sup>391</sup>

As signified by the Montevideo Convention in the criterion of 'capacity to enter in relations with other States' each State is established on the basis of independence.<sup>392</sup> Taking examples of the [Transkei, Bophuthatswana, Venda and Ciskei (TBVC)], other than South Africa, the 'Bantustan States' although they were constitutionally independent under their respective Status, they were unable to conduct international relations and therefore could not qualify as States.<sup>393</sup> They were considered to lack capacity to enter into relations with other States. In the South African case of *S v Banda* where the statehood of Bophuthatswana was tested, Friedman J held that,

'... in regard to its capacity to enter into relations with other States, Bophuthatswana has a Foreign Minister, ... The fact that it is precluded from doing so due to political considerations in no way detracts or derogates from its ability to do so..., although it has the capacity to do so, depends on the attitude and response of other States.'<sup>394</sup>

Not only the TBVC entities possess this status, the Turkish Republic of Northern Cyprus (TRNC) is in a similar situation. In the European case of *Calgar v Bellingham* the Commissioners held that TRNC could not qualify as a State because of its non-functional independence and also its incapability to enter into relations with other States.<sup>395</sup> Politics and economic conditions are some of the conditions relevant to consider when determining independence of an entity in international law.<sup>396</sup>

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<sup>388</sup> Hoyle op cit note 11 at 86.

<sup>389</sup> Arieff op cit note 313 at 71.

<sup>390</sup> Hoyle op cit note 11 at 86.

<sup>391</sup> Arieff op cit note 313 at 71.

<sup>392</sup> Crawford op cit note 15 at 59.

<sup>393</sup> Dugard op cit note 74 at 89.

<sup>394</sup> *S v Banda* supra note 48 at 540 G-F

<sup>395</sup> *Calgar v Bellingham* (1996) STC 74 ILR 21.

<sup>396</sup> Dixon op cit note 8 at 117.

Apart from a few Western States, there is no sufficient evidence that Somaliland has entered into relation with other States. It is concluded that Somaliland does not satisfy the statehood criterion of ‘capacity to enter into relations with other States’.

### III. THE REPUBLIC OF SOMALILAND AND RECOGNITION

During its five days of independence, Somaliland’s independence was recognised by 35 States and was registered at the UN.<sup>397</sup> Recognition of Somaliland’s independence is now considered to have been conducted prematurely. At the time, requirements of a State or government were less stringent than it had been thought.<sup>398</sup> However, it could have been presumed that Somaliland gained independence from British colonial powers and the UN was in support because Somaliland was considered to possess rights of governing its territory.<sup>399</sup>

Due to its close ties with Somaliland, Ethiopia is one State that has so far exhibited an implied recognition of Somaliland as a State.<sup>400</sup> This is demonstrated by Ethiopia’s negotiated bilateral agreements with the government of Somaliland. In 2000, the elected President of Somaliland was received in Addis Ababa with presidential honour like any other president in the world. The Somaliland president held bilateral talks and negotiated agreements with the Ethiopian Federal Government.<sup>401</sup> The Ethiopian Prime Minister has reportedly stated Ethiopia’s stance over Somaliland’s independence to which it is in favour. Beginning of 2002, Ethiopian authorities recognise and accept Somaliland’s travel documents.<sup>402</sup>

The USA does not recognise Somaliland despite its gradual close ties with Hargeisa, Somaliland. This could be because the African Union (AU) members have not recognised Somaliland as a State.<sup>403</sup> Some European countries have also related with Somaliland as a *de facto* government. This is evidenced by the European Commission (EC)’s extensive development and humanitarian aid programs through Non-Governmental Organisations (NGOs) operating in Somaliland.<sup>404</sup>

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<sup>397</sup> Arieff op cit note 313 at 64

<sup>398</sup> Crawford op cit note 15 at 57.

<sup>399</sup> Ibid.

<sup>400</sup> Arieff op cit note 313 at 70

<sup>401</sup> Ibid.

<sup>402</sup> Ibid.

<sup>403</sup> Ibid.

<sup>404</sup> Arieff op cit note 313 at 70; Crisis Group 2006; (Schinn 2003).

On the other hand, agencies of the United Nations have tacitly recognised Somaliland's separate status. The UNHCR, World Food Program (WFP) and the World Health Organisation (WHO) all have conducted negotiations with Somaliland authorities, a stance which implies that recognition of Somaliland as a State is intended.<sup>405</sup>

There are at least four offices in Somaliland established by the United Nations Development Program (UNDP) aimed at supporting and strengthening Somaliland's legislative bodies and economic developments<sup>406</sup>. These offices carry out their economic and developmental objective activities directly with Somaliland's local authorities.<sup>407</sup> More arguably, the UN-HABITAT agency administers a Somaliland Urban Development Program.<sup>408</sup>

Implicitly, the British Government tacitly treat Somaliland as an independent State. In its parliamentary session of December 2007, the Minister of State, Mark Malloch Brown stated that the British policy was to;

'Support international efforts to develop a peaceful and sustainable democracy in Somaliland [and] encourage the Somaliland authorities to engage in constructive dialogue with the transitional federal government to agree [on] a mutually acceptable solution regarding their future relationship'.<sup>409</sup>

Harris argued that a State may exist without being formally recognised. Whether or not it has been formally recognised by other States, it has a right to be treated by them as a State.<sup>410</sup> According to this view, a State may exist without being recognised, and if it does exist in fact, then whether or not it has been formally recognised by other States, it has a right to be treated by them as such. Therefore, recognition can only be considered as a political act recognising a pre-existing State of affairs. For example, Russia has been unsympathetic to calls for recognition of Somaliland because this would have direct implications on its position on Chechnya's independence.

The United Nations has remained silent on either collective recognition or non-recognition of the Republic of Somaliland. Although a few existing States have implied

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<sup>405</sup> Arieff op cit note 313 at 69. Ordon 1999, 576; UN-HABITAT, "Progress on Good Governance in Somaliland," May 25, 2005 available at <http://www.unhabitat.org/content.asp?cid=1999&catid=5&typeid=6&subMenuId=0>, accessed on 20 December 2016.

<sup>406</sup> M Iqbal D Jhazbhay *Somaliland: Post-War Nation-Building and International Relations 1991-2006* LLD Thesis, University of the Witwatersrand, 2001.

<sup>407</sup> <http://www.so.undp.org/Themes/Governance/Administration.htm>

<sup>408</sup> Arieff op cit note 313 at 69.

<sup>409</sup> United Kingdom Parliamentary Records, vol. 697, no. 22, December 11, 2007, available at <http://www.publications.parliament.uk/pa/cm/cmhansrd.htm>, accessed 20 December 2016.

<sup>410</sup> Harris op cit note 2 at 105.

recognition of Somaliland as a State, the fact remains that Somaliland is not recognised as a State in the international community. Despite a wide range of contacts and several diplomatic visits to Somaliland, there is no State that has officially recognised Somaliland as a State.

Due to its lack of capacity to enter into relations with other States, Somaliland does not satisfy the traditional criteria of statehood in international law. Additionally, without recognition by existing States, Somaliland is not a State. In *S v Banda*, Friedman J stated that, ‘... substantial element of the constitutive view is subjective ....’<sup>411</sup>

#### IV. CONCLUSION

Based on the traditional objective criteria of statehood set out in the Montevideo Convention, this chapter has demonstrated that Somaliland partly meets the traditional criteria that would qualify her to be a State in international law. Also, Somaliland relatively satisfies suggested additional criteria. From the international legal point of view, Somaliland has a permanent population of 3.8 million Sunni Muslims. Secondly, it has a defined territory which is determined on the basis of the boundaries fixed by colonial powers. Although there are territorial disputes with its neighbours such as Puntland, international law does not necessarily require absolute demarcated boundaries.<sup>412</sup>

Thirdly, Somaliland has a functional and effective government which is stable and functions in an orderly manner thus, exercising control and effective authority over the territory it lays claims on.<sup>413</sup> Fourthly, although there is insufficient evidence of Somaliland’s capacity to enter into relations with other States, it has been demonstrated that a few States have so far entered into relations with Somaliland. This is proven by Somaliland entering into relations with other States such as Ethiopia, UK and the USA. Somaliland has a Minister of State for Foreign Affairs who operate diplomatic missions in the USA, the UK, Italy and Ethiopia; it also hosts high level delegation missions to Somaliland and Somalia.<sup>414</sup> However, it is unclear whether these relations are correctly forceful because internationally, the government of Somalia still acts on behalf of Somaliland.

In principle, the Republic of Somaliland fulfils the Montevideo Convention requirements for statehood in international law. Therefore, under the declaratory theory, the

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<sup>411</sup> *S v Banda* supra note 48 at 540 G-F.

<sup>412</sup> *Lalos* op cit note 99 at 805.

<sup>413</sup> Benjamin R Farley ‘Calling a State a State: Somaliland and international recognition’ (2010) 24 *Emory International Law Review* 777 at 817.

<sup>414</sup> *Ibid.*

Republic of Somaliland is a State in international law. In *S v Banda*, the court held that, Bophuthatswana satisfied these requirements and was therefore a sovereign independent State possessing *majestas* not only according to the law of Bophuthatswana and that of South Africa, but also according to the principles of international law.<sup>415</sup> However, due to its non-recognition, Somaliland is not a State.

With international legal scholars still unable to provide a dependable solution to the question of whether the creation of a new State through unilateral secession is in accordance with international law, the case of Somaliland's secession and declaration of independence is far from being settled.

In contemporary international law, unilateral secession or mere declaration of independence does not qualify an entity to become a State. In addition, neither satisfying the criteria of Montevideo Convention qualifies an entity to become a State but recognition by existing States plays a significant role in the creation of States.

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<sup>415</sup> *S v Banda* supra note 48 at 540 G-F.



## CHAPTER V: GENERAL CONCLUSION AND RECOMMENDATION

### I. SUMMARY AND RECOMMENDATION

In this thesis, the notion of statehood, its classical traditional and additional criteria under international law have been established. The criteria of statehood have undergone significant changes since its formal conception from the Peace of Westphalia in 1648. In the 20th and 21st centuries, issues of statehood have shifted from being a ‘matter of law’ to being regarded as a ‘matter of fact’.

Additionally, the development of additional and suggested criteria for statehood and analysis of recognition in contemporary international law have been underscored. It has been argued that for an entity to become a State, satisfying additional criteria and recognition by other State are key elements of State creation in contemporary international law. The fundamental discussion revolves around the question of whether the creation of States is dependent on or independent of recognition by the existing States. Opinions and views have been expressed by legal scholars but contentious issues of recognition remain unresolved.

It has also been argued that the doctrine of secession is far from being settled in international law. It has been established that clear misperception about secession and right to secession exists among legal writers. International law does neither grant sub-State entities a general right to secede from their parent States nor does it prohibit secession.<sup>416</sup> The vagueness surrounding secession subjects the notion to an issue of contention in international law.

A central objective in this project was the concept of statehood and unilateral secession in international law. Outside the context of colonial system, the exercise of the right to self-determination does not usually result in creation of a State; it can only be achieved with the consent of the parent State, through constitutional framework or follow an initial declaration of independence or consensual secession.

Other than Bangladesh, Eritrea and South Sudan, there is no unilateral secession that has so far been successful in post-colonial context. As seen in this thesis, a number of entities attempted secession from their parent States but have not been successful. There is no evidence that international law unequivocally supports non-consensual creation of a new State on a territory of an existing State. Analysis of the international conventions, UN

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<sup>416</sup> Thomas Franck *Opinion Directed at Question 2 of the Reference* in ‘Anne Bayefsky (ed) *Self-Determination in International Law: Quebec and Lessons Learned*’ (2000) 83.

Resolutions and State practice reveals that international law neither recognises nor prohibits secession.

Additionally, neither a mere declaration of independence nor satisfaction of the traditional statehood criteria of permanent population, defined territory, government and capacity to enter into relations with other States does necessary infer an entity the status of a subject of international law (State). In accordance with international law, it has been argued that an entity which satisfies the criteria of statehood does not automatically become a State. Recognition though not a rule of customary law, is a requirement.

States are not created through application of the indicia criteria (the Montevideo criteria or additional criteria of statehood). As rightly stated in Vidmar's view, States emerge out of a political process whereby a declaration of independence is accepted as in the case of Somaliland. Vidmar concluded that, the criteria of statehood (Montevideo and the additional criteria) are at the best, policy guidelines, rather than legal norms. On the other hand, an entity which does not achieve the traditional criteria is also not prohibited from becoming a State.

In some cases if not all, an entity may fulfil the traditional criteria of statehood but may not be accorded the status of statehood. This is because of the political nature of State practice. For example, Kosovo and Somaliland fulfil the traditional legal criteria of statehood but are not recognised as States in international law. This is due to the political element of recognition. Shaw on the other hand argued that, recognition is a method of accepting factual situations and endowing them with legal significance, a relationship which is complex to resolve. Due to the political nature of recognition, States have no obligation to granting recognition; as such, some States remain unrecognised, practically on political grounds. Vidmar also argued that the withholding of recognition is not always a matter of policy, but may be required by international law.

Based on State practice and the suggested additional criteria for statehood, these elements complement the traditional statehood criteria. An entity which fails to meet the new criteria cannot emerge as a new State. For instance, a State created as a result of breaching *jus cogens* cannot qualify to become a State hence its creation is illegal and cannot produce legal rights to the wrongdoer. However, additional criteria have been suggested but they are still questionable as to whether they are sufficient and necessary for Statehood in international law.

Despite Somaliland acting as a State for more than two decades, its existence as a State cannot be achieved without recognition by existing States and subsequent admission to

the United Nations. However, the theories of recognition are disputable and legal scholars remain divided. But as other scholars have argued, State creation is a matter of fact and not law. For instance Kosovo's statehood is a fact because in due course, Kosovo will be widely recognised as a State. However, in the case of Somaliland, there is clear evidence that lack of exceptional attributes required to attract widespread international recognition negates Somaliland to becoming a State in international law.

It is concluded that fulfilling the traditional criteria of statehood does not create a State unless recognition of a new claimant entity is made by existing States. The legitimacy of unilateral secession remains unclear. Although Somaliland has unilaterally seceded and has fulfilled the traditional criteria of statehood, without recognition Somaliland's secession is unsuccessful. According to contemporary international law, Somaliland is not a State.

Somaliland is hopeful that it will eventually be recognised as a State. However, it is torn in between a blocked choice of attempting reconciliation with a failed State or remains in the limbo of non-recognition by the international community. The international community still recognises Somalia as a State and secession of Somaliland would violate the territorial integrity of the parent State, Somalia.

While the UN Charter recognises a right of self-determination, the same Charter guarantees the territorial integrity of its Member States. As such, Member States within the international community are obliged to uphold the integrity of Somalia. It is recommended that Somaliland should seek Somalia's consent for approval of its declaration of independence and unilateral secession.

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